(11).

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Status: GRANTED

Title: Lee M. Thomas, Administrator, United States Environmental Protection Agency, Appellant
v.
Union Carbide Agricultural Products Co., et al.

Docketed:
September 27, 1984

Court: United States District Court for the Southern District of New York

Counsel for appellant: Solicitor General

Counsel for appellee: Weinstein,Kenneth W.

Entry	Date	Note	Proceedings and Orders
1	Sep 27 1984	G	Statement as to jurisdiction filed.
2	Oct 31 1984		Motion of appellees Union Carbide Agricultural Products Co., et al. to affirm filed.
3	Nov 7 1984		DISTRIBUTED. November 21, 1984
4	Nov 20 1984	X	Reply brief of appellant Ruckelshaus, Adminr., EPA filed.
5	Nov 26 1984		PROBABLE JURISDICTION NOTED. Justice O'Connor OUT.
			**********
6	Sep 13 1984		Application for stay filed (A-178).
7	Sep 17 1984		Response requested by Marshall, J., due Sept. 21, 1984.
8	Sep 17 1984		Referred to Conference of Oct. 5, 1984.
9	Sep 21 1984		Response received.
10	Oct 9 1984		Application for stay granted.
11	Jan 9 1985		Joint appendix filed.
12	Jan 11 1985		Brief amicus curiae of Griffin Corp, et al. filed.
13	Jan 11 1985		Brief of appellant Ruckelshaus, Adminr., EPA filed.
14	Jan 11 1985		Brief amicus curiae of PPG Industries, Inc. filed.
15	Jan 17 1985		Record filed.
16	Jan 18 1985		Record filed.
18	Jan 31 1985		Order extending time to file brief of appellee on the merits until February 28, 1985.
19	Feb 5 1985		SET FOR ARGUMENT. Tuesday, March 26, 1985. (4th case).
20	Feb 28 1985		Brief of appellees Union Carbide Agricultural Products Co. Inc., et al. filed.
21	Feb 28 1985		Brief amicus curiae of Gulf and Great Plains Fdtn. filed.
22	Mar 5 1985		CIRCULATED.
23	Mar 11 1985	X	Reply brief of appellant Ruckelshaus, Adminr., EPA filed.
24	Mar 26 1985		ARGUED.

84-497 (1)

No.

Office-Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

JAMES M. SPEARS
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANNE S. ALMY
JACQUES B. GELIN
JOHN A. BRYSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

A. JAMES BARNES
General Counsel

EDWARD C. GRAY
MARCIA E. MULKEY
ROBERT S. MCLAUGHLIN
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

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QUESTIONS PRESENTED

1. Whether a constitutional challenge to the data compensation and arbitration scheme of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136a(c)(1)(D)(ii), is justiciable when the plaintiffs fail to show an actual injury that would be redressed by the requested relief.

2. Whether, if we assume the issue is justiciable, FIFRA's data compensation and arbitration provisions violate Article III of the United States Constitution because the awards made by the arbitrators selected under the statute are subject to review by an Article III court only on a showing of "fraud, misrepresentation, or other misconduct." 7 U.S.C. 136a(c)(1)(D)(ii).

3. Whether, if we assume the issue is justiciable and these provisions violate Article III, the plaintiffs are entitled to a judgment invalidating the entire scheme for consideration of previously submitted data rather than a judgment striking the limitation on judicial review.

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: Abbott Laboratories, Ciba-Geigy Corporation, E.I. duPont De Nemours Company, FMC Corporation, Rhone-Poulenc, Inc., Rohm and Haas Company, Stauffer Chemical Corporation, Uniroyal, Inc., Velsicol Chemical Corporation and Zoecon Corporation. The following companies, originally parties to this action, were dismissed prior to final judgment: Ralston Purina Company, Salisbury Laboratories, Inc., Sandoz, Inc., Upjohn Company and the National Agricultural Chemicals Association.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment and order (App., *infra*, 1a-4a) of the district court is not reported. The prior opinion of the district court (App., *infra*, 5a-20a) is reported at 571 F. Supp. 117.

JURISDICTION

The judgment of the district court (App., *infra*, 1a-4a) was entered on August 7, 1984 and was amended (App., *infra*, 21a-22a) on September 4, 1984. The Administrator of the Environmental Protection Agency filed a notice of appeal to this Court on September 6, 1984 (App., *infra*, 23a-24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution and the relevant portions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, are reprinted in App., *infra*, 27a-31a.

STATEMENT

1. Following the remand and reconsideration ordered by this Court on July 2, 1984,[1] the court below has again declared unconstitutional a key provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, the federal legislation regulating the marketing and use of pesticides. This Court directed reconsideration in light of its recent decision in *Ruckelshaus* v. *Monsanto Co.* (*Mansanto*), No. 83-196 (June 26, 1984), a case in which the Court reviewed and sustained the constitutionality of FIFRA's data licensing and disclosure provisions; accordingly, we reiterate only the essential elements of those provisions. Under the statute, persons seeking to market a pesticide product in the United States first must obtain a registration from the Environmental Protection Agency (EPA). 7 U.S.C. 136a(a). The Administrator bases his determination to grant a registration, in part, on test data submitted or cited by the applicant for registration, data that generally include information on the chemical nature and structure of the pesticide as well as test results on the potential dangers of the product. Section 3(c)(1)(D) of FIFRA permits EPA to consider certain categories of health and safety data submitted by one applicant in support of the application of another company. 7 U.S.C. 136a(c)(1)(D). That Section also provides that the later applicant, in order to cite the data, must offer to compensate the original submitter; if the parties cannot agree on the amount of compensation, either may initiate binding arbitration proceedings.

[1] *Ruckelshaus* v. *Union Carbide Co.*, No. 83-1564.

In the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (1978 Amendments), Congress modified FIFRA's registration scheme in order to promote competition and to eliminate needless duplicative testing. *Monsanto*, slip op. 4-7, 26. Under the 1978 Amendments, applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i), 7 U.S.C. 136a(c)(1)(D)(i). All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years following the original submission, if the applicant offers to compensate the original submitter. § 3(c)(1)(D)(ii), 7 U.S.C. 136a(c)(1)(D)(ii). Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. § 3(c)(1)(D)(iii), 7 U.S.C. 136a(c)(1)(D)(iii).

Congress also modified the compensation provisions in 1978, significantly changing EPA's role in the scheme. Unlike the prior statutory regimen, in which EPA decided the amount and terms of compensation when the data submitter and the subsequent applicant could not agree, the revised statute provides that either party may initiate arbitration proceedings by asking the Federal Mediation and Conciliation Service to designate an arbitrator. § 3(c)(1)(D)(ii), 7 U.S.C. 136a(c)(1)(D)(ii). The statute

further provides that the "findings and determination of the arbitrator shall be final and conclusive" and not subject to judicial review "except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator" (*ibid.*).[2]

2. Several large pesticide firms brought this action in 1976 in the United States District Court for the Southern District of New York, challenging the constitutionality of the disclosure provisions of FIFRA, as amended in 1972 and 1975. Following the 1978 Amendments, appellees amended their complaint to allege that both the data consideration and data disclosure provisions took their property in violation of the Fifth Amendment and deprived them of their property without due process of law. The district court granted appellees' motion for a preliminary injunction with respect to all data submitted prior to the enactment of the 1978 Amendments. *Amchem Products, Inc.* v. *Costle*, 481 F. Supp. 195 (S.D.N.Y. 1979). The Second Circuit reversed, however, concluding that appellees had failed to show a likelihood of success on the merits, and this Court denied a petition for a writ of certiorari. *Union Carbide Agricultural Products, Inc.* v. *Costle*, 632 F.2d 1014 (1980), cert. denied, 450 U.S. 996 (1981).

Following that round of litigation, appellees stipulated to dismissal with prejudice of their taking claims and their due process claims as to the data

[2] Section 3(c)(1)(D)(ii) also provides for sanctions against parties who do not cooperate with the arbitration scheme. If an applicant fails to comply with the terms of a compensation agreement or an arbitration award, its registration is subject to cancellation; if a data submitter fails to participate or otherwise comply, it forfeits its right to compensation (7 U.S.C. 136a(c)(1)(D)(ii)).

consideration provisions. Thus, two contentions remained: (1) that the disclosure provisions, as applied to data submitted prior to 1978, violated due process, and (2) that the arbitration and compensation provisions were an unconstitutional delegation of legislative authority. After this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), appellees added a claim that the arbitration and compensation scheme violated Article III of the United States Constitution because the statute impermissibly assigned judicial functions to the arbitrators and limited judicial review.

The district court granted appellees' motion for summary judgment on their Article III claim (App., *infra*, 5a-20a).[3] The court first rejected the government's contention that any challenge to the compensation and arbitration scheme was not ripe for review until a party had suffered concrete injury from the results of a specific arbitration (App., *infra*, 15a n.2). In the court's view, there was no "profit" in delaying resolution of the issue; the mere "statutory compulsion to seek relief through arbitration" was sufficient to create a concrete case or controversy (*ibid.*). On the merits, the court concluded that the arbitration scheme is an "impermissible intrusion on the judiciary" (App., *infra*, 19a), relying on this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*. Because the statute barred Article III courts from reviewing the arbitrator's decision except in instances of "fraud, misrepresentation, or other misconduct," there was, in

[3] The court also rejected plaintiffs' due process claim against the retroactive application of the disclosure provisions and did not reach the claim of unconstitutional delegation of legislative authority (App., *infra*, 14a, 19a).

the court's view, an "absolute assignment of power" to the arbitrators that violated Article III (App., *infra*, 19a).

On the basis of this holding, the district court entered a broad injunction (App., *infra*, 25a-26a). Rather than striking down only the limitation on judicial review of the arbitrator's decision, the court declared the entire compensation and arbitration scheme unconstitutional (App., *infra*, 25a). Further, the court enjoined the Administrator from "permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)," save when the original data submitter consents to the use of such data (App., *infra*, 26a).

3. The government took a direct appeal to this Court (No. 83-1564) pursuant to 28 U.S.C. 1252 and urged the Court to dispose of the case in accordance with the anticipated decision in *Monsanto*, where the same issues were presented. 83-1564 J.S. 6-13. In *Monsanto*, the district court had declared that the data licensing and disclosure provisions were an unconstitutional taking of property and enjoined their implementation. The court also had held the arbitration and compensation scheme invalid as a violation of Article III. *Monsanto*, slip op. 11. This Court vacated the district court's judgment and sustained the constitutionality of the statute. The Court held that there was no taking as to data submitted prior to October 22, 1972, and after September 30, 1978, but that under certain circumstances, firms that submitted data between those two dates may have a claim for just compensation. *Id.* at 17-25. The Court further held that the district court erred in enjoining implementation of the statute because the Tucker Act, 28 U.S.C. 1491, was available to satisfy any

claim for just compensation. *Monsanto*, slip op. 27-30.[4] In addition, the Court concluded that Monsanto's Article III claim was not ripe for review since "Monsanto did not allege or establish that it had been injured by actual arbitration under the statute." *Monsanto*, slip op. 31.

4. The Court then vacated the judgment in the present case and remanded for reconsideration in light of *Monsanto*. Order of July 2, 1984. On remand, appellees amended their complaint and filed motions for reentry of judgment and for a preliminary injunction. The amended complaint alleged that one of the appellees, Stauffer Chemical Company, had submitted data to EPA in support of registrations for pesticides containing butylate, that EPA had considered these data without Stauffer's consent in granting a registration application filed by PPG Industries, Inc. for a pesticide containing the same active ingredient, and that Stauffer had invoked the arbitration provisions of FIFRA against PPG. Amended Complaint for Declaratory and Injunctive Relief, filed July 16, 1984.[5] Further, the complaint stated that the arbitration panel made an award on June 28, 1983, and that the award was less than Stauffer had demanded (*ibid.*). The amended complaint, however, did not request that the award be set aside or allege any legal defect in the award, other than the previous claim that the procedure for

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[4] The Court held, however, that a data submitter must first seek satisfaction through the statute's arbitration procedure. *Monsanto*, slip op. 29.

[5] These events had occurred before the district court's initial entry of judgment in 1983 and the government had so informed this Court when the case was here before. 83-1564 J.S. 9 n.5.

reaching the award was unconstitutional.[6] As in the previous complaint, the only requested relief was prospective, *i.e.*, that the statutory provisions be declared unconstitutional and that EPA be enjoined from implementing the data licensing scheme under which compensation is to be determined by arbitration (*ibid.*).

Following a hearing, the district court reinstated its judgment. The court concluded that "under the amended complaint the issue [was] ripe as to data submitted by plaintiff Stauffer Chemical Company post-1978 as to which there has been an award by an arbitrator" and that there was no basis for changing its earlier decision (App., *infra*, 21a). The judgment, as before, declares the compensation scheme unconstitutional as a violation of Article III and enjoins EPA from permitting or implementing any use of data subject to the compensation scheme except where the data submitter consents to such use (App., *infra*, 21a). As a result, the provision for mandatory

[6] In fact, the award is being attacked in a separate action filed, not by Stauffer, but by PPG (which is not a party to the instant case). *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, Civ. Action No. 83-1941 (D.D.C. filed July 7, 1983). PPG's complaint asks that the award be set aside as excessive because the arbitrators awarded Stauffer not only a share of the data development costs but also compensation based on the PPG's product sales. PPG also claims that Section 3(c)(1)(D) is unconstitutional under the Due Process Clause, the Taking Clause, and Article III. Stauffer has not challenged the award as being inadequate; indeed, it has counterclaimed for enforcement of the award. In the alternative, Stauffer has cross-claimed against EPA for a declaration that the statute violates Article III and counterclaimed against PPG for cancellation of PPG's registration and for damages in the amount of the award in the event the statutory compensation scheme is invalidated.

data licensing is invalidated, and the injunction creates a right to exclusive use of data submitted after 1969 by all pesticide registration applicants.[7]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The district court has again enjoined enforcement of a key provision of FIFRA that effectuates Congress's express intent that the pesticide registration program become more efficient and that competition in the industry be increased. See *Monsanto*, slip op. 25-27. Because the court apparently viewed the limitation on judicial review of arbitrations as an integral part of the data consideration provisions, the judgment prevents EPA from granting registrations based on previously submitted data without the permission of the firm that submitted the data. It thus invalidates the heart of the comprehensive scheme created by Congress, which carefully weighed the need for increased competition and the need for innovation in the pesticide industry. *Ibid.* The injunction here is nearly as broad as the judgment this Court vacated in *Monsanto*. If the decision below is allowed to stand, Congress's desire to encourage competition in the pesticide industry and avoid unnecessary duplication of testing will continue to be thwarted.

All the issues presented here were also considered in *Monsanto*, and this Court held that the constitutional challenges to the arbitration and compensation scheme were not ripe for review. Despite this Court's remand for reconsideration in light of that holding,

[7] On September 4, 1984, the district court refused to stay its judgment pending the government's appeal. On September 11, 1984, we applied to the Circuit Justice for a stay pending disposition of the government's appeal.

the district court here has resurrected its previous judgment. The court's decision is no more correct than it was before. First, the court erroneously held that the challenge to the arbitration scheme was justiciable, despite the fact that no concrete case or controversy involving the results of an arbitration was presented. Second, the district court's decision on the merits ignores this Court's decisions approving the use of mandatory arbitration schemes that provide limited judicial review. Third, the relief is far broader than the holding required, and has the effect of invalidating not only the limitation on judicial review of arbitrations, but also a critical part of the regulatory scheme. This Court should again note probable jurisdiction to review these erroneous constitutional rulings and to sustain the congressional design for regulation of the pesticide industry.

1. The challenge to the constitutionality of the arbitration and compensation scheme does not present a justiciable case or controversy since none of the plaintiffs has alleged or established that it has been injured by an actual arbitration under the statute. In these circumstances, it was error for the district court to reach the merits. When this case was before the Court last Term none of the parties had alleged or established that it had been injured by a FIFRA arbitration. Accordingly, as the Court held in *Monsanto*, the issue was not ripe for review. Ripeness is a threshold element of Article III's requirement of a case or controversy, see *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Federal courts are thus without jurisdiction to adjudicate hypothetical disagreements or abstract claims before action has been

taken that causes concrete injury to the aggrieved party. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 164 (1967).

To satisfy Article III's requirement of a case or controversy, appellees must show, at a minimum, that they have suffered (or are threatened by) an actual injury and that the requested relief would redress the claimed injury. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-73, 81 (1978). This requirement of Article III serves to define the judiciary's role in the allocation of power among the three branches of government, *Valley Forge*, 454 U.S. at 473-474, and to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Duke Power Co.*, 438 U.S. at 72 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

Contrary to the district court's conclusion, nothing that has transpired since this Court vacated the earlier judgment has materially changed the situation. The belated allegation that Stauffer, alone among the appellees, had been a party to an arbitration—a fact made known to this Court before it vacated the 1983 judgment—does not create a live case or controversy. Stauffer has not asserted that the award was inadequate or inconsistent with the substantive or procedural requirements of the statute, nor has it asked any court to review, increase, or set aside the award. Indeed, appellees informed the district court that they "do not challenge the result of

any arbitration, nor does the adjudication of [appellees'] claims depend in any manner on the outcome of an arbitration." Memorandum in Support of Plaintiffs' Motion for Reentry of Judgment, July 16, 1984, at 6. Most tellingly, in the pending action brought by PPG for review of the award, see note 6, *supra*, Stauffer has counterclaimed for *enforcement* of that very arbitration award and, in the alternative, has counterclaimed for damages from PPG *in the amount of the arbitration award* in the event the statutory compensation scheme is invalidated.

These facts confirm the wisdom of the approach taken in *Monsanto*. Until a party to whom compensation is owed employs the full statutory procedure for obtaining compensation, it remains possible that the party will receive all it is due. For this reason, any grievance against the statutory compensation scheme is hypothetical until the arbitration proceedings have run their course. Only then, should a party challenge the result and seek to augment its compensation, would a justiciable question arise.

In this case Stauffer requests no relief that would increase its favorable arbitration award; and in the action brought by PPG, Stauffer is seeking to have the award enforced. Surely, where Stauffer has no quarrel with the substance of the arbitration award, it has not suffered an injury of the sort that would make its claim justiciable.[8] Should there ever come a time when Stauffer obtains an unfavorable arbitration award and seeks judicial review to remedy that perceived shortcoming, it may then have a justiciable

[8] This Court held in *Monsanto* (slip op. 31; emphasis added) that "the operation of the arbitration procedure affects *only* [the data submitter's] ability to vindicate its statutory right to obtain compensation from a subsequent applicant."

case and controversy. It certainly does not have one now.[9]

2. Even if this claim were presently justiciable, the district court erred on the merits. Binding arbitration of statutorily created entitlements does not offend any requirement of procedural due process. *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U.S. 151, 157-158 (1931) (state statute mandating arbitration of the amount of loss under insurance policy). See *Crane* v. *Hahlo*, 258 U.S. 142 (1922) (damage awards for municipal construction work reviewable only for jurisdictional defects, fraud, or willful misconduct). See also *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123 (3d Cir. 1969); *Edwards* v. *St. Louis S.F.R.R.*, 361 F.2d 946 (7th Cir. 1966).

[9] The district court confined its finding of ripeness to Stauffer, and did not make any finding with respect to the remaining appellees. Those parties alleged they were aggrieved because as to any future arbitration, they would be forced to seek compensation in a non-Article III forum. This is a claim of threatened injury, rather than actual past injury, and *Monsanto* forecloses any contention that this allegation satisfies the requirements of Article III. There, this Court expressly held that the Article III challenge would not become ripe unless EPA had considered previously submitted data in granting another registration and there had been an arbitration award. Slip op. 31. See *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 304-305 (1979); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 164 (1967). None of the remaining appellees have alleged that they satisfy these criteria. They are all in precisely the same position as Monsanto and, as in *Monsanto*, their challenge should not be permitted to proceed.

Contrary to the district court's holding, FIFRA does not offend Article III by assigning the resolution of a compensation dispute to an arbitrator whose decision is subject to limited judicial review. This Court has upheld laws that "withdr[e]w judicial review of administrative determinations in numerous cases involving the statutory rights of private parties." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333 (1966). See *Switchmen's Union* v. *National Mediation Board*, 320 U.S. at 300-301, 303. Moreover, this Court's recent decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), relied on by the district court here, is not to the contrary. The vice of the 1978 Bankruptcy Act was the assignment to the bankruptcy courts of the authority to adjudicate traditional common law rights (458 U.S. at 81-86); the challenged provisions of FIFRA deal only with a statutorily-created right of recent vintage. Indeed, the plurality in *Northern Pipeline* reaffirmed Congress's constitutional authority to proceed in this manner (*id.* at 83 (footnote omitted)):

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Thus, the court below erred in relying on *Northern Pipeline* to strike down the arbitration provision.

3. Finally, even if the statutory provision had properly been held to violate Article III, that conclusion would not justify enjoining the operation of

Section 3(c)(1)(D)(ii) in its entirety. On the contrary, the only appropriate relief would be to strike down the limitation on review by an Article III court, since there can be no doubt that the scheme would be constitutional so long as complete judicial review can be obtained in an Article III court.[10] See *Northern Pipeline*, 458 U.S. at 83; *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). See also *United States* v. *Raddatz*, 447 U.S. 667, 682-683 (1980); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 53 (1936).

The district court's apparent conclusion that the limitation on judicial review was integral to the operation of the data consideration, compensation, and arbitration scheme cannot be sustained. Whether a statute or any of its provisions should be viewed as inseparable is a matter of congressional intent. *INS* v. *Chadha*, No. 80-1832 (June 23, 1983) slip op. 10-11; *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *Tilton* v. *Richardson*, 403 U.S. 672, 682-684 (1971); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938). Here, Congress has plainly spoken. The statute provides that the invalidity of "any provision * * * or the application thereof * * * shall not affect other provisions or applications" (7 U.S.C. 136x). The achievement of the primary purpose of Section 3(c)(1)(D)(ii), to permit consideration of pre-

[10] If the review limitations alone were stricken, district courts would have jurisdiction under 28 U.S.C. 1331 to review arbitration decisions. See *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979). That too, however, is a question not ripe for adjudication until district court review of a particular arbitration award is sought.

viously-submitted data and to provide a compensation mechanism for that use of the data, is not dependent on the limitation on judicial review. Where, as here, "what remains after severance 'is fully operative as a law,'" a provision will be "presumed severable." *INS* v. *Chadha*, slip op. 13, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). Moreover, there is nothing in the legislative history to suggest that Congress would have failed to enact the provision without such a limitation, and therefore nothing to overcome the presumption of severability. Accordingly, the district court failed to fulfill its duty "to save and not to destroy" the remaining portions of the statute. *Tilton* v. *Richardson*, 403 U.S. at 684, quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).[11]

[11] Indeed, that duty had been made all the more emphatic by the fact that this Court in *Monsanto* had just sustained the constitutional validity of provisions whose enforcement the district court again saw fit to enjoin.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

JAMES M. SPEARS
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANNE S. ALMY
JACQUES B. GELIN
JOHN A. BRYSON
Attorneys

A. JAMES BARNES
General Counsel

EDWARD C. GRAY
MARCIA E. MULKEY
ROBERT S. MCLAUGHLIN
Attorneys
Environmental Protection Agency

SEPTEMBER 1984

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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79 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, ET AL., DEFENDANTS

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Owen, District Judge

Pursuant to the Supreme Court's order of July 2, 1984, this Court has reconsidered its earlier decision, reported at 571 F. Supp. 117, in light of *Ruckelshaus v. Monsanto Co.*, 52 U.S.L.W. 4886 (June 26, 1984).

Upon remand, plaintiffs amended their complaint and moved for reentry of judgment. Their motion was accompanied by affidavits setting forth certain facts pertinent to the issue of ripeness. At a conference held on July 19, 1984, counsel for defendants indicated that the facts as alleged by plaintiffs were not contested. Defendants moved for summary judgment, and introduced no evidentiary materials.

Upon a review of the record of these proceedings, and upon briefing and argument by the parties, and

the defendants not opposing, there appear no genuine issues of material fact. Accordingly, the Court will enter judgment upon the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff Stauffer Chemical Company ("Stauffer") submitted substantial research data to EPA in support of pesticide registrations for products containing butylate and EPTC, as well as other active ingredients. Stauffer submitted data during three distinct periods of time: from January 1, 1970 through October 21, 1972; from October 22, 1972 through September 30, 1978; and after September 30, 1978. Some of the data submitted by Stauffer are listed in the exhibit to the affidavit of Andrew F. Fink of Stauffer, executed on July 20, 1984.

2. After September 30, 1978, EPA considered the research data concerning these chemicals that had been submitted by Stauffer during each of these time periods to support pesticide registrations on behalf of other applicants, including PPG Industries, Inc. and Drexel Chemical Company, for pesticides containing butylate and EPTC.

3. Such consideration by EPA of data submitted by Stauffer was without Stauffer's consent.

4. Stauffer demanded an arbitration pursuant to FIFRA § 3(c)(1)(D) to obtain compensation for the use of its data to support PPG's me-too registrations for butylate. A panel of three arbitrators made an award to Stauffer in this arbitration on June 28, 1983. *In the Matter of the Arbitration between Stauffer Chemical Company and PPG Industries, Inc.*, AAA Docket No. 16199 077 82 FIFRA. The arbitrators found that EPA relied on data submitted

by Stauffer to support pesticide registrations for butylate.

5. Stauffer is aggrieved by the use of its data by EPA in support of the registrations of other applicants; by the fact that it is compelled to resort to an unconstitutional arbitration process under FIFRA § 3(c)(1)(D) to obtain the compensation to which it is entitled by statute; and by the fact that it has received an award through arbitration that is less than the amount to which it claims to be entitled.

Conclusions of Law

1. This Court has jurisdiction in this case pursuant to the Supreme Court's order of July 2, 1984. *Ruckelshaus v. Union Carbide Agric. Products Co., Inc.*, 52 U.S.L.W. 3928.

2. The consideration by EPA of data submitted by plaintiffs during the time periods from January 1, 1970 through October 21, 1972 and after September 30, 1978, does not effect a taking of their property. *Ruckelshaus v. Monsanto*, 52 U.S.L.W at 4893. Plaintiffs accordingly have no remedy under the Tucker Act for EPA's use of these data.

3. With respect to data submitted between October 21, 1972 and September 30, 1978, the Tucker Act does not provide a remedy adequate to cure the constitutional defects inherent in FIFRA § 3(c)(1)(D). A claim under the Tucker Act would resolve only the liability of the United States regarding the taking of plaintiffs' property. It would not resolve the liability of subsequent "me-too" registrants on whose behalf the property is taken, the parties which Congress clearly intended should pay for the data.

4. Because the Court has found that plaintiff Stauffer is aggrieved by EPA's use of its data, by

the compulsion to resort to an unconstitutional arbitration process under FIFRA § 3(c)(1)(D), and by the arbitration award that it has received, there is a live case or controversy. The claims presented by Stauffer challenging the constitutionality of FIFRA § 3(c)(1)(D) are ripe for resolution under the criteria established by the Supreme Court. *Ruckelshaus v. Monsanto*, 52 U.S.L.W. at 4895.

5. The remaining plaintiffs face a clear threat of the use of their data by EPA pursuant to FIFRA § 3(c)(1)(D) to support other applicants' registrations and are similarly aggrieved by the compulsion to resort to the same unconstitutional arbitration process.

6. As to the merits of the challenge to the constitutionality of FIFRA § 3(c)(1)(D), there is no basis for changing the views earlier expressed by the Court at 571 F. Supp. at 124.

Judgment accordingly is reentered as provided in this Court's order of August 7, 1984.

/s/ R. Owen
United States District Judge

Dated: 9/4/84
New York, New York

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2913(RO)

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL., PLAINTIFFS

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, ET AL., DEFENDANTS

July 28, 1983

OPINION AND ORDER

OWEN, District Judge

This action arises out of a challenge to the constitutionality of certain aspects of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. Specifically, plaintiffs object to the requirement that they disclose their testing data to the public (the "disclosure" provisions) and a second requirement that allows competitors to use such data in support of their own pesticide registrations (the "use" provisions). Defendant is the administrator of the United States Environmental Protection Agency (the "EPA"). The parties are presently before me on

cross-motions for summary judgment. Before I turn to the merits, a review of the statutory history is appropriate.

In 1947, Congress enacted the forerunner of today's FIFRA. At inception, the statute simply required the developer or manufacturer of a pesticide to register its product with the Secretary of Agriculture prior to introducing it into the marketplace. The registration process itself was relatively straightforward. An applicant was required to file its name and address, the name of the pesticide to be registered, a complete copy of the labeling and a statement of the claims made for it, including directions for use, and, if requested by the Secretary, a full description of the tests made and the results upon which any claims were based. The Secretary was also vested with the power to require an applicant to submit the complete formula of its pesticide. If it appeared that its composition was such as to warrant the proposed claims made for it and if it otherwise conformed with the requirements of FIFRA, after reviewing the data submitted the Secretary registered the pesticide. If the Secretary was dissatisfied with the application, the applicant would be provided with notice and an opportunity to correct its deficiencies.

FIFRA was substantially revised in 1972:

> as a response to growing public concern about public health and ecological effects of pesticides. The new FIFRA provided for a more complete registration process and stronger enforcement measures, and heralded a policy of thorough scientific analysis of pesticide chemicals before making them available to the public. Now . . .

> not only does an applicant for registration have to show his pesticide's composition is such as to warrant the proposed claims made for it and that its labeling and other submitted materials comply with the Act before he may obtain a registration but the EPA must also determine that the pesticide will perform its intended function without unreasonable adverse effects on the environment, and that, when used in accordance with widespread and commonly recognized practice, it will not generally cause adverse effects on the environment.

Mobay Chemical Corp. v. Costle, 517 F.Supp. 254, 258 (W.D.Pa. 1981) *aff'd in part sub. nom. Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3rd Cir. 1982).

The 1972 amendments still required persons applying to register pesticides to submit extensive testing data in support of their registrations but allowed them to retain certain proprietary rights in their data even after submission. To this end, former section 10(a) permitted data submitters to designate portions of their data as either trade secrets or commercial or financial information, and former section 10(b) prohibited the EPA from disclosing those portions.

The 1972 amendments also allowed data submitters certain rights of compensation. Thus, the EPA was prohibited from using publicly available data it had received in support of one pesticide registration to support the registration of another pesticide unless the subsequent data user first offered to pay reasonable compensation to the original data submitter. Where possible, the level of compensation was to be negotiated by the original data submitter and the

data user. Where agreement could not be reached, the EPA retained the power to set the level of compensation. The original data submitter, however, retained the right to appeal this determination to the federal district court.

Such a compensated use program had benefits for both the EPA and for registrants. It increased administrative efficiency by allowing the EPA to rely on already approved testing techniques and it benefited original data submitters by mandating compensation when their data was used by another registrant.

The 1978 amendments to FIFRA were enacted in response to certain problems which had arisen following the enactment of the 1972 revisions. Among these difficulties was the practice adopted by many data submitters of designating large portions of their data as "trade secret" material in order to avoid subsequent disclosure. Obviously, this tactic precluded the EPA's use of their data to support the registrations of competing pesticide manufacturers. As a result, the trade secret provisions both limited the EPA's efficient management of its registration process and undercut the compensation program envisioned by the drafters.

Pursuant to the 1978 amendments, all applicants are no longer required to make the extensive filings previously mandated. Rather, applicants must now file either "a full description of the tests made and the results thereof upon which the claims are based or, alternatively, a citation to data that appear in the public literature or that previously had been submitted to the Administrator. . . ." 7 U.S.C. § 136a (c) (1) (D).

Moreover, although the original data submitter still retains certain proprietary rights in the data which

it has submitted, those rights have been significantly altered. New section 3 (c) (1) (D) no longer permits a data submitter to invoke trade secret protection. 7 U.S.C. § 136a (c) (1) (D). Rather, it divides all submitted data into three parts. Thus,

> (1) *with respect to pesticides containing active ingredients that are initially registered after September 30, 1978,* the original data submitter is entitled to a period of exclusive use of that data for registration purposes for a period of 10 years;
>
> (2) *with respect to data submitted after December 31, 1969 and not subject to the exclusive use provisions set forth above,* the EPA may use such data in its consideration of the registration applications of applicants other than the original data submitter for a period of 15 years if the applicant has made an offer to compensate the original data submitter. The terms and amounts of compensation are to be set by the parties themselves. Should they fail to reach agreement on compensation, either party may initiate binding arbitration proceedings. The arbitrator's findings and determinations are not reviewable by the federal courts except for fraud, misrepresentation, or other misconduct; and
>
> (3) *with respect to data which is not subject to either the exclusive or the compensated use provision,* the EPA may use data provided by an original data submitter in support of the registration of another applicant without the permission of the original submitter and without an offer of compensation being made.

In sum, the new program allows the developer of new "active ingredients" the exclusive use of its data for a period of ten years and compensated use for a period of five years following the termination of the exclusive use period. It allows registrants of data not qualifying for a period of exclusive use a fifteen-year period of compensated use. And finally, it provides for neither exclusive nor compensated use fifteen years after registration.

In addition to these new use provisions, the 1978 amendments impose new disclosure requirements on registrants. As I mentioned above, under the earlier law registrants were allowed to shield much of their filed data by designating portions thereof as trade secrets. The new section 10(d), 7 U.S.C. § 136h(d), "authorizes the public disclosure of all information concerning the objectives, methodology, results, or significance of any test performed on or with a pesticide, and of any residue, environmental chemistry, safety, toxicology, metabolism, and fish and wildlife data." *Mobay Chemical Corp. v. Costle*, *supra*, 517 F.Supp. at 260. Three significant classes of information, however, remain protected from disclosure "unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk, or injury to health or environment." 7 U.S.C. § 136h(d)(1):

> (A) [information that] discloses manufacturing or quality control processes,
>
> (B) [information that] discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately inert ingredient of a pesticide, or

> (C) [information that] discloses the quantity of any deliberately added inert ingredient of a pesticide.

7 U.S.C. § 136h(d)(1). The use of data made available pursuant to this section for purposes of registration is governed by § 3(c)(1)(D), as set forth above.

In their complaint, plaintiffs attack two aspects of the 1978 FIFRA amendments. First, plaintiffs challenge new section 10 of FIFRA, 7 U.S.C. § 136h—the "disclosure" provision—which allows the EPA to disclose certain information to the public which had been submitted by plaintiffs prior to 1978 and which prior to that date had been insulated from public disclosure by the trade secret protections of the predecessor act. Plaintiffs contend that this disclosure provision is a retroactive deprivation of plaintiffs' property rights in their trade secret data in violation of due process of law. Second, plaintiffs challenge new section 3(c)(1)(D) of FIFRA, 7 U.S.C. § 136a(c)(1)(D)—the "use" provision—which permits the compensated use of plaintiffs' research data by other registrants to support their own federal pesticide registrations. Plaintiffs contend that the compensated use requirement, coupled with the particular arbitration remedy provided in the statute, is improper as an unconstitutional delegation of legislative power to the private arbitrators and, alternatively, is a violation of the Constitution insofar as it deprives the judiciary of its traditional Article III function.

Defendant, by its cross-motion for summary judgment, contends that these sections withstand constitutional scrutiny. I first consider the "disclosure" provisions before turning to the "use" section.

The Disclosure Requirement [1]

As the preceding discussion indicates, prior to 1978, after submitting data in support of their products, pesticide registrants could then designate certain portions of their submissions as trade secret material. Once so designated, data was protected from disclosure by former section 10(b). The 1978 amendments, however, introduced a new program which strongly favors disclosure. Pursuant to new section 10(d), "all information concerning the objectives, methodology, results or significance of any test or experiment" submitted in support of a registration is subject to disclosure except insofar as that information may be protected by certain narrowly drawn exceptions. Thus, the new program affects all data in one of two ways. As to data submitted after the passage of the 1978 amendments, pesticide registrants are on notice that they are relinquishing their expectations to trade secret protection except as narrowly preserved by the statute itself. As to data submitted prior to 1978, the amendments operate more onerously. The expectation fostered by the pre-1978 statute that data designated as trade secret material will be withheld from public disclosure no longer obtains. Only so much of the once-protected data as falls within the statutory exception remains protected from disclosure. The rest, even though it was once secret and even though it may have been

[1] Plaintiffs have requested that the court postpone determination of this aspect of the motions because of the pendency of proposed legislation which would restructure the disclosure provisions in the statute. Insofar as that legislation does not appear to be substantially closer to enactment today than it was on the day that plaintiffs first made their request, that application is denied.

submitted with the expectation that it would not be disclosed, is publicly available.

Plaintiffs challenge the retroactive effect of the 1978 amendments to section 10, 7 U.S.C. § 136h(d), and claim that the pre-1978 statute created the expectation that data designated "trade secret" would be preserved from disclosure and that this expectation fostered by statute constituted a "vested right." Plaintiffs further contend that the retroactive deprivation of this expectation divests them of their property without due process of law. They contend in addition, that this "retroactive application is so harsh and oppressive as to transgress the constitutional [due process] limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Plaintiffs do not contest the new disclosure requirements as they apply to data submitted after the enactment of the 1978 amendments. As the Supreme Court commented in an analogous context:

> [I]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealings, to require that the nature of the product be fairly set forth.

Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431-32 (1919); *see, also, National Fertilizers Ass'n v. Bradley*, 301 U.S. 178 (1937). "Further, [l]egislative acts adjusting the burdens and benefits of economic life come . . . with a presumption of constitutionality, and . . . the burden is on one complaining

of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Even legislation that has retroactive applicability "is not unlawful solely because it upsets otherwise settled expectation." 428 U.S. at 16. "The retroactive aspects [however] must meet the test of due process, and the justifications for the latter may not suffice for the former." 427 U.S. at 17. Thus, the constitutionality of the disclosure provisions must be judged by the standard due process test. If the challenged legislation bears a rational relation to the evil which it seeks to remedy, I may look no further. *Williamson v. Lee Optical Co.*, 348 U.S. 487 (1955).

I conclude that the disclosure requirements embodied in section 10(d), 7 U.S.C. § 136h(d), are neither arbitrary nor irrational. FIFRA was revised in 1972 to accommodate the increasing public interest in the regulation of products which affect the environment with the interest of pesticide manufacturers in protecting costly research data from acquisitive competitors. FIFRA was amended again in 1978 to adjust the balance struck in 1972 when it became apparent that the statutory goal of granting the public access to the data from which they could conduct their own evaluations of new pesticides fell short of achievement by reason of registrants' ability to designate certain portions of their data as trade secrets. That the amendments could have been better drawn or if they upset settled expectations, is of no consequence. The Constitution does not require perfect economic regulation. It only requires that legislation not be arbitrary or irrational. The disclosure provisions meet that standard. Defendant's motion for summary judgment on this issue is therefore granted.

The Compensation-Arbitration Provisions [2]

Plaintiffs also challenge the compensation provisions of the amended statute. Section 3(c)(1)(D),

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[2] Defendant contends that plaintiffs' challenge to the arbitration provisions in FIFRA are premature and that plaintiffs lack standing. I disagree and hold that they have presented a justiciable "cause or controversy."

In order to demonstrate standing, a claimant must show "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. 59, 79. That second component may also be determined by resolving "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Associaiton of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

In this instance, the inquiry therefore focuses on whether plaintiffs are suffering injury in fact by the operation of the arbitration requirements and whether "there is a 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. at 75 n.2. Plaintiffs here would describe their alleged injury in terms of the statutory compulsion to participate in an arbitration procedure that is void *ab initio* as a matter of law and the deprivation thereby of any access to meaningful compensation for the use of their data by subsequent registrants. The Constitution requires only that the plaintiffs allege a "distinct and palpable injury" to satisfy the first component of the test. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The compulsion to arbitrate satisfies that component. Moreover, the second component is more easily satisfied. Where the Constitution requires only "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 72, *quoting Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 21 (1977), plaintiffs' injuries here would be the direct product

7 U.S.C. § 136a(c)(1)(D),[3] the focus of plaintiffs' complaint, calls for the data user, in the first in-

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of the statutory plan. Plaintiffs are clearly within the zone of interest regulated by the use provisions.

Defendants also contend that plaintiffs' challenge to arbitration is not yet ripe for judicial review, *i.e.*, whether an abstract or a concrete question is before the court. "The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbit v. United Farm Workers*, 442 U.S. 289, 297 (1979). Here that question is best settled by inquiring into what profit there would be in the court's waiting for a later date. Defendant contends that this action will not be ripe for resolution until arbitration has produced results unfair to plaintiffs or at least until arbitration has been commenced. Nevertheless, it is not the results of any arbitration procedure that plaintiffs protest, or even the internal procedure thereof, rather it is the statutory compulsion to seek relief through arbitration to the exclusion of any other mechanism. That issue is clearly ripe for resolution.

[3] Section 3(c)(1)(D) states, in pertinent part:

> Each applicant for registration of a pesticide shall file with the Administrator a statement which includes . . .
>
> (D) . . . a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:
>
> (i) With respect to pesticides containing active ingredients that are initially registered under this subchapter after September 30, 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not without the written permission

stance, to make a compensation offer. If the data submitter does not accept that offer within 90 days

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> of the original data submitted, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide:
>
> Provided, That such permission shall not be required in the case of defensive data;
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> (ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for re-registration, the Administrator may, without the permission of the original data submitter. consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data sumitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitted of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings

and the parties have not agreed on a procedure to determine compensation, either the data user or the data submitter may then initiate binding arbitration proceedings. The statute, however, sets no guidelines or standards for the fixing of compensation. Moreover, it provides that "the findings and determination of the arbitrator shall be final and conclusive" and that

> no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . .

Plaintiffs challenge the constitutionality of this provision on two grounds.[4] First, they contend that

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> by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct.

[4] Courts confronted with the questions whether there is a property right in submitted testing data and whether, if there is, the statutory program constitutes a "taking" have reached differing conclusions. *Compare Monsanto Company*

the compensation-arbitration procedure is an unlawfully overbroad delegation because it (1) contains no standards for decision-making, (2) fails to set forth any system through which coherent standards can be developed, and (3) restricts sufficient access to judicial or administrative review. *See Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). And second, they contend that the arbitration-compensation procedure impermissibly intrudes on areas of decision-making constitutionally entrusted to the judiciary. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, —— U.S. ——, 50 U.S.L.W. 4892 (June 28, 1982). While plaintiffs appear correct in their contention that this is a standardless delegation of powers, what is dispositive here is the fact that the proposed arbitration procedure commits to arbitrators the power to resolve valuation issues utterly without judicial review. This absolute assignment of power to arbitrators is an impermissible intrusion on the judiciary.

In *Northern Pipeline*, the Supreme Court held that although the Congress possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated, including the assignment to an adjunct of some functions historically performed by judges . . .[,] the functions of the adjunct must be limited in such a way

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v. Acting Administrator, No. 79-366 C. (E.D. Mo. April 19, 1983, *with Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3rd Cir. 1982), *affirming in part, Mobay Chemical Corp. v. Costle*, 517 F.Supp. 254 (W.D.Pa. 1981), *with Petrolite Corp. v. EPA*, 519 F.Supp. 996 (D.D.C. 1981); *cf., Union Carbide Agricultural Products Co., Inc. v. Costle*, 632 F.2d 1014 (2d Cir. 1980).

that 'the essential attributes' of judicial power are retained in the Art. III court." 50 U.S.L.W. at 4900. There can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation. *Accord, Monsanto Company v. Acting Administrator*, No. 79-366C (E.D. Mo. April 19, 1983).

The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

Submit order on notice effectuating the foregoing.

/s/ R. Owen
United States District Judge

Dated: July 28, 1983
New York, N.Y.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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79 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS

v.

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency, ET AL., DEFENDANTS

JUDGMENT AND ORDER

Owen, District Judge

Upon reconsideration of this case in light of *Ruckelshaus v. Monsanto Co.*, 52 U.S.L.W. 4886 (June 26, 1984), as required by the Supreme Court's order of July 2, 1984, and under the amended complaint the issue now being ripe as to data submitted by plaintiff Stauffer Chemical Company post-1978 as to which there has been an award by an arbitrator, *see Ruckelshaus, supra*, point VII, and concluding that there is no basis for changing the views earlier expressed herein at 571 F. Supp. at 124, judgment is accordingly re-entered as follows:

1. It is hereby ordered, adjudged and decreed that the provisions for the determination of compensation

of section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended by the Federal Pesticide Act of 1978, 7 U.S.C. § 136a(c)(1)(D) (not including the provisions of section 3(c)(1)(D)(i)), are unconstitutional as a violation of Article III of the Constitution.

2. It is further ordered, adjudged and decreed that defendant William D. Ruckelshaus, as Administrator of the United States Environmental Protection Agency, and his officers, agents, employees and representatives, are hereby permanently enjoined from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D), *supra*; provided, however, that notwithstanding the foregoing, any submitter may file a consent to the use of its data in support of a registration or amendment, in which case such registration or amendment shall not be subject to this injunction.

/s/ R. Owen
United States District Judge

Dated: August 7, 1984
New York, New York

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.,
PLAINTIFFS

—*v.*—

WILLIAM RUCKELSHAUS, Administrator,
U.S. Environmental Protection Agency, ET ANO.,
DEFENDANTS

NOTICE OF APPEAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1252, defendants William D. Ruckelshaus, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency hereby appeal to the United States Supreme Court from so much of the judgments entered in this Court on August 7, 1984 and September 4, 1984 as declared a portion of section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136a(3)(c)(1)(D), unconstitutional and enjoined its enforcement.

Dated: New York, New York

September 6, 1984

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/ Frederick M. Lawrence
FREDERICK M. LAWRENCE
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Tel. No. (212) 791-9096

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.,
PLAINTIFFS

—against—

WILLIAM D. RUCKELSHAUS, as Administrator of the United States Environmental Protection Agency,
ET AL., DEFENDANTS

JUDGMENT AND ORDER

Owen, District Judge

Upon consideration of the cross-motions of the parties for summary judgment and the record in this case, judgment is entered as follows:

1. It is hereby ordered, adjudged and decreed that the provisions for the determination of compensation of section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended by the Federal Pesticide Act of 1978, 7 U.S.C. § 136a(c)(1)(D) (not including the provisions of 3(c)(1)(D)(i)), are unconstitutional as a violation of Article III of the Constitution.

2. It is further ordered, adjudged and decreed that defendant William D. Ruckelshaus, as Admin-

istrator of the United States Environmental Protection Agency, and his officers, agents, employees and representatives, are hereby permanently enjoined from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(d), *supra*; provided, however, that notwithstanding the foregoing, any submitter may file a consent to the use of its data in support of a registration or amendment, in which case such registration or amendment shall not be subject to this injunction.

3. It is therefore ordered that to the foregoing extent, plaintiffs' motion for summary judgment is granted.

4. It is further ordered that with respect to plaintiffs' claim as to section 10 of the Federal Insecticide, Fungicide and Rodenticide Act, summary judgment is hereby entered in favor of the defendants and Count I of the amended complaint is dismissed with prejudice.

5. Each party is to bear its own costs.

Dated: November 29, 1983
New York, N.Y.

/s/ R. Owen
United States District Judge

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1, of the Constitution provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The relevant provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, as amended in 1978, provide:

* * * * *

§ 136a(c). Procedure for registration

(1) Statement required

Each applicant for registration of a pesticide shall file with the Administrator a statement which includes—

* * * * *

(D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:

(i) With respect to pesticides containing active ingredients that are in-

itially registered under this subchapter after September 30, 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitted, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided,* That such permission shall not be required in the case of defensive data;

(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") within the fifteen-year period following the date the data were originally sub-

mitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the

parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. Notwithstanding any other provision of this subchapter, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of

the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected person to respond. If a registration is denied or cancelled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation;

(iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data;

(E) the complete formula of the pesticide; and

(F) a request that the pesticide be classified for general use, for restricted use, or for both.

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No. 84-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From the United States District Court
For the Southern District of New York

MOTION TO AFFIRM

KENNETH W. WEINSTEIN
(Counsel of Record)

LAWRENCE S. EBNER
STANLEY W. LANDFAIR
McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Appellees

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether Congress' delegation of nonreviewable judicial power to an arbitrator to adjudicate a data submitter's right to compensation for his research under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii), violates Article III of the Constitution.

2. Whether Congress' delegation of nonreviewable legislative power to a FIFRA arbitrator to establish standards for compensation awards violates Article I of the Constitution.

3. Assuming that FIFRA's compensation scheme is unconstitutional, whether the district court properly enjoined the use of a data submitter's research to register competitors' copycat pesticides with the U.S. Environmental Protection Agency, where FIFRA conditions the use of the submitter's data on payment of compensation.

THE PARTIES

Pursuant to Supreme Court Rule 28.1, the parties and their publicly held parent companies and non-wholly-owned subsidiaries and affiliates are:

Abbott Laboratories

Ciba-Geigy Corporation
Ciba-Geigy Ltd. (Parent)

E.I. du Pont de Nemours & Co.

FMC Corporation
Ataka Construction & Engineering Co., Ltd.
CBV-Industria Mecanica, S.A.

Rhone-Poulenc, Inc.
Rhone-Poulenc S.A. (Parent)

Rohm and Haas Company
The Shipley Company
Advanced Genetic Sciences

Stauffer Chemical Company

Union Carbide Agricultural Products Company, Inc.
Union Carbide Corporation (Parent)
Union Carbide Australia and New Zealand Limited
Union Carbide Canada Limited
Union Carbide Mexicana, S.A. de C.V.

Uniroyal, Inc.
UNIROYAL Industri Turk A.S.
Uniroyal LIMITED (U.K.)

Velsicol Chemical Corporation
Northwest Industries, Inc. (Parent)

Zoecon Corporation
Sandoz Ltd. (Parent)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-497

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From the United States District Court
For the Southern District of New Y ..

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, appellees move that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

This appeal is an attempt by the government to escape the Supreme Court's unequivocal prohibition against encroachment upon the authority of the judiciary. The Court's holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,' 458 U.S. 50 (1982), that the assignment of judicial power to Article I bankruptcy judges to adjudicate the liabilities of one private party to another is unconstitutional, plainly prohibits the far more egregious assignment which is at issue here—the assignment of judicial authority

to private arbitrators who are exempt from judicial review. By suggesting "there can be no doubt" that the arbitration scheme at issue here "*would be* constitutional as long as complete judicial review could be obtained in an Article III court," (J.S. at 15)[1] (emphasis added), the government concedes doubt concerning the unconstitutionality of the statute. The suggestion that this constitutional issue can be resolved in a summary reversal (J.S. at 17) is preposterous, and manifests the government's attempt to undermine the effect of the Court's decision in *Northern Pipeline*.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, requires that an offer of compensation be made to the submitter of original pesticide research data when the U.S. Environmental Protection Agency (EPA) uses the submitter's research to register a copycat ("me-too") pesticide product. FIFRA § 3(c)(1)(D)(ii). Absent an agreement with the me-too applicant, the submitter can obtain compensation only by requesting the Federal Mediation and Conciliation Service (FMCS) to appoint an arbitrator. FIFRA gives the arbitrator "final and conclusive" authority to adjudicate the submitter's compensation and commands that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination," except for fraud or misrepresentation.

The principal issues presented by this case are whether FIFRA's delegation of nonreviewable judicial power to arbitrators to determine a data submitter's right to compensation violates Article III of the Constitution; and if it does violate Article III, leaving the submitter with no constitutional forum in which to obtain compensation, whether it was proper for the district court to enjoin the uncompensated use of the submitter's data to grant registration to me too applicants.

[1] References to EPA's Jurisdictional Statement and to the appendix thereto are cited as "J.S." and "J.S. App.," respectively.

The district court twice concluded that there is "no question" that FIFRA's arbitration scheme violates Article III "on its very face," under the authority of this Court's ruling in *Northern Pipeline*. (J.S. App. 4a, 20a and 21a). Furthermore, after this Court remanded EPA's original appeal to the district court for consideration in light of its decision last term in *Ruckelshaus v. Monsanto Co.*,[2] 104 S. Ct. 2862 (1984), the district court also reaffirmed its original conclusion that this case is ripe because, *inter alia*, appellee Stauffer Chemical Company had undergone an arbitration and was aggrieved by EPA's use of its data, by the compulsion to resort to the unconstitutional arbitration scheme to obtain compensation, and by the inadequacy of the compensation award itself. (J.S. App. 3a-4a).

Because FIFRA's violation of Article III is clear on the face of the statute, the question raised by EPA's appeal is insubstantial. The judgment of the district court should not be disturbed.

1. To register a pesticide, an applicant must present the results of extensive research and testing to demonstrate the safety of the pesticide to man and the environment. FIFRA §§ 3(c)(1)(D) and 3(c)(2)(A). This research must include a comprehensive array of tests to determine the pesticide's toxicological properties and effects on the environment. 40 C.F.R. § 162.8 (1983), and 40 C.F.R. Part 158, printed in 49 Fed. Reg. 42,856 (1984) (test data requirements for registration).

Appellees are inventors and producers of pesticide chemicals. They support vast research programs to develop new products and establish their safety and efficacy.

[2] This case presents issues that were not decided by the Court in *Monsanto*. *See infra* at 8-9.

The research to develop a pesticide often costs tens of millions of dollars,[3] may take 14 to 22 years, and typically requires the screening and testing of 20,000 chemicals for each successful product. *Monsanto*, 104 S. Ct. at 2871. Many of the research data produced as a result of these efforts are trade secrets under state law, *id.*, and give rise to property interests protected by the Constitution. *Id.* at 2874.

EPA's premarket testing requirements impose substantial burdens on product innovators, like appellees. Not only must the innovator alone bear the cost and risk of the research, but his new products must be withheld from the market for several years while they are being tested in accordance with EPA requirements and undergoing EPA review. FIFRA thus imposes a delay cost on the innovator because of the postponement of income that would be generated from marketing the product.[4] Each year of regulatory delay can cost the developer millions of dollars and shorten the term of any available patent protection.

In order to minimize duplicative testing, FIFRA allows imitators (me-too applicants) to satisfy EPA's testing requirements by relying on research performed by the product innovator. FIFRA § 3(c)(1)(D)(ii).[5] Under this man-

[3] The National Agricultural Chemicals Association reported that manufacturers spent $580 million for pesticide R&D in 1983. 1983 Industry Profile Survey of the National Agricultural Chemicals Association, p. 7.

[4] Office of Technology Assessment, U.S. Congress, Technological Innovation and Health, Safety and Environmental Regulation, at VIII-47 (1981); The Conservation Foundation, Product Regulation and Chemical Innovation, at IV-33 (1980).

[5] A limited exception to the mandatory licensing requirement is contained in FIFRA § 3(c)(1)(D)(i) (J.S. App. 27a-28a). This section specifies that data submitted in support of certain new products registered after September 30, 1978 may not be relied on by other applicants for a period of ten years. The validity of this provision is not at issue in this appeal.

datory licensing provision, the me-too applicant gains immediate entry to the market, without risk or delay or testing costs, thereby avoiding entirely the burdens of government regulation borne by the innovator alone. Because of this inequity, and to provide incentives for innovative R&D, FIFRA provides that the original data submitter's research may be used to support the me-too applicant's registration "*only if* the applicant has made an offer to compensate the original data submitter." § 3(c)(1)(D)(ii) (J.S. App. 20a) (emphasis added).

Prior to 1978, FIFRA provided that if the parties did not agree, the amount of compensation would be determined by EPA, with a right to appeal to the federal district courts. (J.S. App. 8a); *Monsanto*, 104 S. Ct. at 2868. But as amended in 1978, FIFRA removed EPA from the compensation procedure and required the data owner to initiate "binding arbitration" under the auspices of FMCS.[6] FMCS is empowered "to appoint an arbitrator" from its roster of arbitrators (J.S. App. 29a). The findings and determination of the arbitrator are "final and conclusive." FIFRA further declares that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . ." § 3(c)(1)(D)(ii) (J.S. App. 29a-30a).

[6] FMCS "is in the business of helping to resolve labor disputes between employers and representative[s] of their employees." It "rarely arranges or conducts arbitration of commercial disputes" and its private labor arbitrators "do not handle commercial disputes arising under FIFRA." 45 Fed. Reg. 55,395 (1980). For this reason, FMCS appoints arbitrators to FIFRA cases from the roster of the American Arbitration Association ("AAA"). 29 C.F.R. § 1440.1 (1984).

The statute provides no standard for the arbitrator to follow in determining compensation.[7] FIFRA thus vests in each arbitrator, in each case, the authority to formulate criteria governing compensation, as well as the unreviewable power to determine the amount of compensation awarded.

2. During the pendency of the district court action, EPA used appellees' research data to grant me-too registrations to competitors for several important products. Some of these data contained confidential analytical techniques (for example, methods for quantifying radiolabeled pesticide metabolites) which met the standards for trade secrets under the laws of the states where appellees reside.[8]

As an example, EPA used appellee Stauffer Chemical Company's research data concerning the pesticides butylate and EPTC to issue me-too registrations to PPG Industries, a large manufacturer, as well as to others. (J.S. App. 2a). These herbicides alone account for sales of hundreds of millions of dollars in the United States.

Because no agreement could be reached, Stauffer had no choice but to initiate an arbitration against PPG Industries

[7] FMCS declined to publish a standard for compensation on the ground that neither FIFRA nor the legislative history "specified a formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55,394 (1980); 45 Fed. Reg. 28,105, 28,107 (1980). The district court agreed that "this is a standardless delegation of powers." (J.S. App. 19a.) *See also* the opinion of the district court in *Monsanto Co. v. Acting Administrator, EPA*, 564 F. Supp. 552, 567 (E.D. Mo. 1983). Indeed, former EPA Administrator Douglas M. Costle requested Congress to establish guidelines for determining compensation, H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974, but Congress did not do so.

[8] The trade secrets are described in the Memorandum of Plaintiffs in Support of Motion for Summary Judgment at 23-25, 50, and accompanying affidavits. *Union Carbide Agricultural Products Co., Inc. v. Ruckelshaus*, No 76 Civ. 2913 (filed Aug. 24, 1981).

in April 1982 for compensation for PPG Industries' use of Stauffer's butylate research. (J.S. App. 2a). *In re Stauffer Chemical Co. v. PPG Industries*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983). Over Stauffer's objection, FMCS appointed three arbitrators to the case who had been subjected to training on the factors that EPA (which Congress had removed from any official role in determining compensation) thought should control the arbitrators' decision[9]—factors with which Stauffer strongly disagreed. The arbitration decision rendered in June 1983 left Stauffer aggrieved by awarding it a small fraction of the amount of compensation claimed (J.S. App. 3a)—approximately $50 million less than the amount to which Stauffer claimed entitlement. FIFRA barred appeal by Stauffer of the award.

3. Because appellees were threatened with the continued use of their data to support competitors' registrations (J.S. App. 4a), they requested the district court to enjoin the operation of FIFRA's "use of data" provision insofar as it permitted competitors to rely on an originator's data without providing a constitutionally valid mechanism for obtaining the compensation that the statute requires. Appellees claimed that the compensation scheme was infirm under Article I as well as Article III.[10]

[9] Memorandum of Law in Support of EPA's Motion to Dismiss or for Summary Judgment at 86, *Union Carbide Agricultural Products Co. v. Ruckelshaus*, No 76 Civ. 2913 (dated Oct. 26, 1981).

[10] In the court below, appellees previously had challenged the use of data provision of § 3(c)(1)(D), as well as the data disclosure provision of § 10 of FIFRA, as a taking of property without just compensation, raising the same issue that ultimately was decided by the Court in *Ruckelshaus v. Monsanto Co.* After the Chourt of Appeals for the Second Circuit reversed an order granting a preliminary injunction, *Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), appellees dismissed their Fifth Amendment claim in the district court, reserving the right to refile a taking claim in the U.S. Claims Court. Appellees amended their complaint and filed a motion for summary judgment raising the Article I and Article III claims presented here.

Under the authority of this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the district court held, on cross-motions for summary judgment,[11] that FIFRA's delegation of unreviewable judicial authority to arbitrators violates Article III. (J.S. App. 20a.)

On appellees' claim of an unconstitutional delegation of legislative power to the arbitrators, the district court concluded that appellees "appear correct . . . that this is a standardless delegation of powers" that is "utterly without judicial review," but did not rest its decision on that ground alone. (*Id.* at 19a.)

In holding that FIFRA's arbitration scheme violates Article III, the district court recognized that Congress, in accordance with *Northern Pipeline*, possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated. This includes the authority to assign to an adjunct some functions historically performed by judges—provided that the functions of the adjunct are limited in such a way that the essential attributes of judicial power are retained in an Article III court. (J.S. App. 19a-20a.) The district court concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation." (*Id.*) It found that the arbitration scheme deprives the courts of any role in fact-finding and bars them from considering matters of law arising from the substantive issues in the compensation dispute. "This leaves the courts with no power to make any 'informed, final determination' of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III." (*Id.*)

[11] No fact material to the constitutionality of § 3(c)(1)(D) has been disputed by any party.

The district court rendered a judgment declaring FIFRA's provisions for determination of compensation unconstitutional as a violation of Article III, and enjoined the use of a submitter's data where compensation is to be determined under § 3(c)(1)(D). (J.S. App. 25a-26a.)[12]

The district court also rejected EPA's contention that the case was not ripe. Because FIFRA compelled appellees to seek compensation for the use of their data through the arbitration scheme, the court concluded that the constitutionality of that scheme was clearly ripe for resolution. (J.S. App. 16a n.2).

4. EPA appealed directly to this Court (No. 83-1564). During the appeal, the Court ruled on the taking question raised in *Ruckelshaus v. Monsanto Co.* As part of its taking claim, Monsanto alleged that just compensation was not available for any taking effected by FIFRA because of the Article III defect in the compensation scheme. The Court did not decide the merits of the Article III issue in *Monsanto*. Rather, it held that Monsanto's challenges to the constitutionality of the compensation scheme were not ripe for resolution because "the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA." 104 S. Ct. at 2882. The Court further stated that "[o]nly after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." *Id.*

[12] In a second count of their complaint, appellees also challenged FIFRA's grant of authority to EPA to disclose trade secret information on the ground that it effects a retroactive deprivation of property rights without due process of law. The district court found that the statute's withdrawal of trade secret protection did not violate due process requirements regardless of whether it upset settled expectations. (J.S. App. 14a.) That issue is not before the Court in this case.

In the *Union Carbide* appeal, the Court subsequently vacated the judgment and remanded without opinion for further consideration in light of *Ruckelshaus v. Monsanto. Ruckelshaus v. Union Carbide Agricultural Products Co.*, 104 S. Ct. 3566 (1984) (mem.). The Court expressed no view as to the merits of the district court's ruling.

On remand, appellees moved, with supporting affidavits, that the original judgment be reentered on the ground that the case was clearly ripe in view of Stauffer's arbitration award. Following a hearing at which EPA stipulated that it did not contest Stauffer's factual allegations concerning the arbitration, the district court reentered its original judgment. (J.S. App. 1a, 21a). It found that Stauffer was aggrieved by EPA's use of its data under FIFRA and by the statute's compulsion that Stauffer resort to an unconstitutional arbitration procedure to obtain compensation for the use of its data. Furthermore, Stauffer alleged, EPA did not contest, and the district court found, that Stauffer also was aggrieved by the tremendous shortfall in the amount of compensation awarded.[13] (J.S. App. 3a-4a). Based on these facts the court concluded that Stauffer's claims were ripe for resolution under the *Monsanto* criteria. (J.S. App.

[13] Although Stauffer clearly was aggrieved by the arbitration procedure and resulting award, and the district court so found, Staufer was precluded by § 3(c)(1)(D)(ii) from seeking judicial review of the award. Despite the fact that PPG Industries voluntarily agreed to use Stauffer's data and participate in the arbitration, it has asked another district court to overturn the award, on the ground the § 3(c)(1)(D)(ii) is unconstitutional, and that the arbitrators allegedly are guilty of misconduct. *PPG Industries, Inc. v. Stauffer Chemical Co.*, Civ. No 83-1941 (D.D.C. filed July 7, 1983). Stauffer's position is that because the arbitration scheme is unconstitutional, PPG Industries' registrations should be cancelled. In addition, Stauffer contends that PPG Industries should pay damages for the use of Stauffer's data for the period that the registrations were in effect. Moreover, if the arbitration scheme is upheld, Stauffer is entitled to enforcement of the award, the only option possible under FIFRA absent facts indicating fraud or misconduct.

4a).[14] Finding that "there is no basis for changing the views earlier expressed" that § 3(c)(1)(D) violates Article III, the court reentered the judgment. (*Id.*)

EPA again appealed to this Court and obtained a stay of the judgment.

THE QUESTION PRESENTED WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

In enacting the arbitrator compensation scheme of FIFRA, Congress unconstitutionally delegated plenary legislative and judicial power to arbitrators. The Executive Branch controls the selection of arbitrators for each case, and has the power to appoint only arbitrators who submit to its indoctrination. The arbitrators are vested with absolute power to establish legislative standards for compensation, and to adjudicate the data owner's compensation rights without review by Article III courts. FIFRA thus violates the doctrine of separation of powers that is at the core of the Constitution's grant of Article I and Article III authority. Under the principles enunciated in *Northern Pipeline*, FIFRA's constitutional infirmity is obvious.

Appellees have been harmed by this scheme. Congress required that they be paid compensation as a condition for the use of their research data to register competitors' products pursuant to § 3(c)(1)(D). Appellees' data have been used, but appellees have no constitutional forum available in which they can obtain compensation.

The district court thus properly granted a judgment enjoining any use of data that is conditioned upon the unconstitutional compensation determination. Furthermore, because Congress clearly expressed its desire to keep

[14] The court also concluded that all of the appellees faced a "clear threat" of the use of their data by EPA pursuant to § 3(c)(1)(D) to grant me-too registrations, and are aggrieved by FIFRA's compulsion to resort to the unconstitutional arbitration scheme to obtain compensation.

arbitration disputes out of the federal courts, this Court should not take it upon itself to legislate a judicial review system for arbitrations in contravention of Congress' intent. The statute should be sent back to Congress to design a compensation scheme that conforms with the requirements of Article I and Article III.

The judgment of the district court should be affirmed.

I. THIS CASE IS RIPE

The district court concluded, both in its original opinion and on remand, that appellees' claims are ripe. (J.S. App. 16a n.2. and 4a.) EPA's argument to the contrary is based on a mischaracterization of the complaint, and on a misrepresentation of facts that EPA did not contest in the court below.

This case is *not*—as EPA would have the Court believe—a hypothetical challenge to FIFRA's arbitration scheme. (J.S. 10, 12.) Rather, the thrust of appellees' challenge is to FIFRA's "use of data" provision. Appellees' contention is that use of their data should not be permitted because Congress conditioned such use on payment of compensation, and compensation is not available because of the constitutional defects in the arbitration scheme.[15] The injury that appellees already have experienced, and that threatens to occur again,[16] is *the use of their data* by competitors. (J.S. App. 2a, 4a.) The district court found that appellees, and in particular appellee Stauffer, are aggrieved by the use of their data without a constitutional forum in which to obtain

[15] As the district court stated, "plaintiffs object to the requirement . . . that allows competitors to use such data in support of their own pesticide registrations. . . ." (J.S. App. 5a.) "Plaintiffs contend that the compensated use requirement, coupled with the particular arbitration remedy provided in the statute, is improper. . . ." (J.S. App. 11a.)

[16] This threat is very real. EPA used appellees' data pursuant to § 3(c)(1)(D) before it was enjoined by the district court, and concedes that it will do so again if permitted to implement the statute.

the mandated compensation. (J.S. App. 3a, 4a.) The relief that they requested, and that the district court granted, was to restrain EPA from using any of appellees' data that are subject to a determination of compensation under the defective arbitration scheme. This case therefore is ripe because appellees have suffered actual injury, are threatened with further injury, and the injury is linked directly to the constitutional infirmity in the arbitration scheme. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). (J.S. App. 15a n.2.)

Furthermore, the issues are clearly fit for judicial decision. The questions presented are purely legal. EPA has not alleged that any material fact is in dispute. Nor, quite tellingly, has EPA demonstrated that any fact concerning a particular arbitration could in any way be relevant to the issues presented here. Nothing that occurs in an arbitration would make the issues presented for decision in this appeal any more concrete than they are now. The district court so found. (J.S. App. 16a, n.2.)

In addition, withholding review would cause obvious hardship to appellees. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). They would continue to suffer injury from the use of their data by competitors without being able to obtain the compensation that the statute requires. The injury to appellees here is the same as that suffered by Marathon in *Northern Pipeline*—deprivation of the right to an Article III forum—and this case is no less ripe.[17] Clearly, the facts underlying the breach of contract dispute in *Northern Pipeline* were not even discussed in the opinion and had no more bearing on the Article III issues than do the facts of a specific arbitration here.

[17] Appellees have a "personal right . . . to demand Article III *adjudication" of their compensation claims, Pacemaker Diagnostic Clinic of America v. Instromedix, Inc.* 725 F.2d 537, 541 (9th Cir. 1984) (*en banc*), and that right is infringed by the nonreviewable arbitration scheme.

Appellees need not await the consummation of further threatened injury to obtain preventive relief. *Pacific Gas & Electric Co. v. State Energy and Resources Conservation and Development Commission*, 461 U.S. 190, 103 S. Ct. 1713, 1721 (1983). "[T]he impact of the [arbitrator compensation provision] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories v. Gardner*, 387 U.S. at 152; *see also United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1955). Appellees are entitled to a "reasonable, certain and adequate provision for obtaining compensation" before their property rights in the data they have submitted to EPA are further disturbed. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974).

This case further is ripe under the criteria enunciated in *Monsanto*. EPA concedes that appellee Stauffer's data were used to support me-too registrations and that an arbitration award has been rendered. (J.S. App. 1a, 2a.) Under *Monsanto*, that is all that is required. 104 S. Ct. at 2882.

EPA misrepresents that Stauffer was not injured by the arbitration award, *when in fact EPA did not contest in the district court below that Stauffer was aggrieved by the shortfall in the amount awarded.* Stauffer alleged that it was aggrieved by the insufficiency of the award, EPA did not dispute the allegation, and the district court made such a finding. (J.S. App. 1a, 3a.) EPA cannot now in good faith assert to this Court that "Stauffer has no quarrel with the substance of the arbitration award." (J.S. 12.) That assertion is simply false.

The critical element of EPA's ripeness argument is its assertion that Stauffer has failed to seek review of the arbitrator's award. This makes no sense. EPA simplistically reasons that Stauffer must be happy with the award because it has not sought judicial review and thus has not "employ[ed] the full statutory procedure for obtaining

compensation." (J.S. 12.) Indeed, the "full statutory procedure" expressly bars judicial review of the award. That bar to Article III adjudication is the crux of Stauffer's injury.

Stauffer is not required to pursue or create a remedy which does not exist in order to establish the ripeness of an action challenging the absence of that very remedy. Stauffer has done everything permitted by FIFRA to obtain the compensation to which it is entitled. It has challenged the FIFRA procedure precisely because it does not permit Stauffer to obtain the kind of Article III adjudication that EPA advocates.[18] For that reason, the action is ripe.

II. FIFRA'S ARBITRATOR COMPENSATION SCHEME IS UNCONSTITUTIONAL

A. The Delegation Of Nonreviewable Judicial Power To Arbitrators Violates Article III

Article III, Section 1, of the Constitution commands that the judicial power of the United States be exercised by judges who have the protections prescribed by that article: life tenure and nondiminishable compensation.

FIFRA violates this constitutional mandate by assigning the judicial power of the United States to private arbitrators in a manner even more egregious than the delegation to Article I courts that was held unconstitutional in *Northern Pipeline*. The selection and compensation of the arbitrators under FIFRA are subject to the Executive's control. The arbitrator has plenary power to adjudicate individuals' compensation rights and liabilities under state and federal law. The arbitrator is not merely a fact-finding adjunct to a federal judge; instead, he has been vested by Congress

[18] Furthermore, Stauffer has responded to PPG Industries' challenge to the arbitration award in a manner that is fully consistent with its position here. *See supra* note 13.

with the "final and conclusive" authority to decide all questions of law and fact. The scheme does not retain the "essential attributes of judicial power" in Article III courts, as required by *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982). To the contrary, it specifies that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." § 3(c)(1)(D)(ii). The FIFRA scheme thus violates the principles of separation of powers and judicial impartiality that lie at the heart of Article III.

In *Northern Pipeline*, the Court held that Congress' assignment of judicial power to non-Article III bankruptcy judges, under the Bankruptcy Act of 1978, to adjudicate Marathon's liability to Northern, violates Article III. *Id.* at 87, 91. A majority of the Court agreed that Marathon had the right to insist that Northern's claims, which arose under state law, be adjudicated by an Article III tribunal. *Id.* at 91 (Rehnquist, J., concurring). In the view of the plurality, Article III prohibits Congress from vesting jurisdiction in Article I legislative courts to decide matters of "private rights"—specifically, "the liability of one individual to another under the law as defined." *Id.* at 69-70. With respect to the adjudication of rights arising under federal law, Congress may create Article I tribunals to act as fact-finding adjuncts to constitutional courts, but the "essential attributes of judicial power" must be reserved in the Article III courts themselves. *Id.* at 81.

The district court here concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation" (J.S. App. 20a):

> The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.[19]

(*Id.*)

As in *Northern Pipeline*, the rights at issue here are "private rights," because they involve "the liability of one individual to another under the law as defined." *Northern Pipeline*, 458 U.S. at 69-70. The arbitration adjudicates the submitter's right to compensation from the me-too applicant. The "public rights" doctrine does not apply here. That doctrine applies only to cases in which the government is a party, i.e. those which "arise between the government and parties subject to its authority." *Id.* at 67-68. In an arbitration under FIFRA, the government is not a party. The right to compensation is a private right because it involves the liability of a me-too registrant to a data submitter.

The private rights at issue in the FIFRA arbitrator compensation scheme arise under both state and federal law. Compensation involves the adjudication of trade secrecy rights that arise under state law. Portions of the research data in issue contain highly valuable trade secret techniques. *See Monsanto*, 104 S.Ct. at 2871. (Appellees described the trade secrets in their summary judgment affidavits, *see supra* note 7.) Compensation for data that contain trade secrets may well be greater than for other data, because by definition trade secrets provide their owner with the opportunity to obtain a commercial advantage over competitors. *Monsanto*, 104 S.Ct. at 2873. The

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[19] EPA concedes doubt about the constitutionality of the statute without full judicial review ("there can be no doubt that the scheme would be constitutional so long as complete judicial review can be obtained in an Article III court") (J.S. 15).

determination of whether the data contain trade secrets as defined by state law, and if so, the value of permitting a competitor to use them and destroy the right to exclude (*id.* at 2878), thus involves the adjudication of state law rights. Under *Northern Pipeline*, appellees have a right to an Article III adjudication of these state law claims.

With respect to the adjudication of purely federal statutory rights, a majority of the Court in *Northern Pipeline* also recognized that, at a minimum, review by Article III courts must be provided. The plurality in *Northern Pipeline* stated that although Congress has discretion to prescribe the manner in which federal statutory rights are adjudicated, and may assign fact-finding functions to an adjunct, the adjunct must be limited in such a way that the essential attributes of judicial power are retained in Article III courts. 458 U.S. at 80-81. Under FIFRA, it is the arbitrators, not the courts, who are vested with the essential attributes of judicial power.

In addition, the dissenting justices in *Northern Pipeline* agreed that "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. . . . Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts *should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.*" *Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting) (emphasis added). FIFRA, however, attempts to do precisely that: entirely preclude appellate review.

In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court ruled that the adjudication of federal statutory rights is subject to Article III requirements. "*Crowell* involved the adjudication of congressionally created rights" concerning compensation between employers and employees under a federal statute. *Northern Pipeline*, 458 U.S. at 78. The adjudication in *Crowell* was held to be "one of private right," subject to

Article III. 285 U.S. at 51. The Court found the adjunct scheme in *Crowell* consistent with Article III because "[t]he agency was thus left with the limited role of determining 'questions of fact.'" and "every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (citing *Crowell*, 285 U.S. at 44-45, 48). The Court upheld the compensation scheme "in view of these limitations upon the Compensation Commission's functions and powers." 458 U.S. at 78.

No comparable limitations apply to the FIFRA arbitration scheme. It is an adjudicatory device that is especially abhorrent to the values that Article III was intended to further: "a guarantee of judicial impartiality" and "the checks and balances of the constitutional structure." *Northern Pipeline*, 458 U.S. at 58. The delegation of judicial authority to private arbitrators under FIFRA thus is far more offensive than the delegation found unconstitutional in *Northern Pipeline*.

There is no colorable argument that an arbitrator appointed *ad hoc* under FIFRA could qualify as a fact-finding "adjunct" of the Courts. *See Northern Pipeline*, 458 U.S. at 77-87. FIFRA places *all* of the judicial functions exercised within the control of the executive. *Compare United States v. Raddatz*, 447 U.S. at 676-677, 681-683 (1980); *Northern Pipeline*, 458 U.S. at 79, 81.

An arbitrator appointed under FIFRA enjoys far less independence than a judge sitting on the Article I bankruptcy court declared unconstitutional in *Northern Pipeline*. A bankruptcy judge held office for a term of 14 years and was subject to removal only by the judicial council of the circuit in which he served. His basic qualifications for service could be determined by the Senate. His salary was set by statute. *See Northern Pipeline*, 458 U.S. at 53.

Furthermore, his decisions were guided by a well-established body of statutory law and judicial precedent, and were subject to review in an Article III court.

Under FIFRA, the arbitrator who adjudicates compensation is uniquely beholden to the Executive Branch. He is dependent upon the Executive agency, FMCS, for his appointment to every case. The Executive is free to set qualifications for service at his whim.[20] (FMCS has exercised this power of appointment by selecting only arbitrators who have submitted to "training" by an Executive agency, EPA, on the compensation factors it believes appropriate.)[21] The arbitrator's compensation is subject to the Executive's control.[22] No statutory standard limits the arbitrator's discretion, nor can any court set the decision aside, even if it is arbitrary, unsupported by the record, or contrary to law.

EPA's principal defense for this scheme is to argue that binding arbitration of statutorily created entitlements does not offend any requirement of procedural due process. (J.S. 13.) This proposition is faulty for two reasons. First, it ignores the fact that private rights, implicated by state law, are at issue in a FIFRA arbitration, *Monsanto*, 104 S. Ct. at 2873, and that the statutory rights at issue require adjudication in an Article III court. *Northern Pipeline*, 458 U.S. at 80-81. *See supra* at 17-18. EPA's argument, in an effort to restrict the application of *Northern Pipeline*, thus abandons the "private right-public right" distinction relied on by the Court in favor of a novel "common law right-

[20] § 3(c)(1)(D)(ii) gives FMCS the authority "to appoint an arbitrator from the roster of arbitrators maintained by such Service" for each dispute (J.S. App. 29A).

[21] *See* discussion *supra* at 7.

[22] FMCS delegated the initial authority to fix the arbitrator's compensation to the AAA and retained final decision-making authority. 29 C.F.R. § 1440.1; 29 C.F.R. pt. 1440 app. §§ 41, 42 (1984).

statutory right" distinction which the Court's precedents do not support. Second, the due process argument is irrelevant. Like the bankruptcy adjudication at issue in *Northern Pipeline*, FIFRA's arbitrator compensation scheme clearly contravenes Article III, whether or not it offends due process as well.

EPA cannot cite a single decision, by this Court or by any other, which has upheld an assignment of unreviewable judicial power to a non-Article III tribunal to adjudicate liability between individuals, without statutory standards and without an opportunity for substantive review in an Article III court.

B. FIFRA's Delegation Of Absolute Legislative Power To Arbitrators Violates Article I

Article I, Section 1, of the Constitution vests "all legislative powers" in the Congress of the United States. If the constitutional principle of separation of powers is to retain its vitality, FIFRA's delegation of absolute legislative power to arbitrators must be struck down. As the district court found, "this is a standardless delegation of powers" that is "utterly without judicial review." (J.S. App. 19a.)

FIFRA says nothing more than that the me-too applicant must "compensate" the data originator. § 3(c)(1)(D)(ii). Congress has abdicated its responsibility to set compensation standards to an ad hoc group of arbitrators. Unlike Congress, the arbitrators are not responsible to the electorate but to the Executive Branch, which appoints them individually to each dispute. Each arbitrator has unfettered discretion to apply arbitrarily any compensation standard he may fancy. Each arbitrator has the power to make the important policy choice on which Congress defaulted: how a product innovator who bears the brunt of government-mandated testing and regulation should be compensated when competitors use his research to market generic

imitations of his product. The choices before the arbitrator—whether to base compensation on the fair market value of the use of the data, on the impact of regulation on the innovator, on sharing of the cost of the research data, or on some other theory—implicate a wide range of socioeconomic values concerning incentives for innovation and competition policy.

The delegation under FIFRA is unprecedented. Appellees know of no instance in which Congress has sought *both* to impose a completely standardless delegation of legislative power *and* to bar the courts from any substantive review of the delegatee's exercise of the power. Unlike other cases in which broad delegations have been upheld, here no necessity has been shown either for the absence of an "intelligible principle" to guide the arbitrator's exercise of discretion or for the preclusion of court review "to test that exercise against ascertainable standards."[23] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *See also INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 2785 n.16 (1983). There are no precedents to guide the arbitrator because each arbitration is *sui generis*. *Compare Lichter v. United States*, 334 U.S. 742, 783 (1948). Because each arbitrator is appointed on a case-by-case basis, the delegatee has no residual authority or opportunity to develop continuity of policy. *Compare United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

FIFRA's delegation is an affront to the Constitution's separation of powers. If this delegation of legislative power can be sustained, the principle of separation of powers can have little meaning.

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[23] Former EPA Administrator Douglas Costle, during hearings on the 1978 FIFRA amendments, asked Congress to "make more explicit what factors it feels are pertinent in determining reasonable compensation." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

III. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

A. The District Court Correctly Enjoined The Use Of Data Subject To The Invalid Arbitrator Compensation Scheme

Having found FIFRA's arbitrator compensation scheme unconstitutional, the district court enjoined EPA "from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)." (J.S. App. 25a-26a, para. 2.) The relief ordered by the district was proper because FIFRA conditions the use of data upon payment of compensation.

Section 3(c)(1)(D)(ii) authorizes EPA to rely upon an originator's data to grant a registration to a me-too applicant "*only if* the applicant has made an offer to compensate" (emphasis added). The statute provides a "right to compensation for the use of the data." *Id.* (J.S. App. 30a). Thus, FIFRA establishes an inextricable link between the use of data and compensation.

Congress' purpose in requiring compensation was to prevent "just plain stealing" the use of data. *Federal Environmental Pesticide Control Act: Review of FEPCA Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 11 (1973) (statement of Rep. Poage, Chairman, House Committee on Agriculture). Congress would not have permitted the use of data in the absence of a procedure for obtaining compensation. This was confirmed by Senator Patrick Leahy, a principal sponsor of the arbitration provision:

> [W]e are not allowing free use of ... data by competitors. If a registrant wishes to use the data generated by another company to support their registration then he must pay compensation for the data. ...

123 Cong. Rec. 25,706 (1977). Congress viewed compensation as the *quid pro quo* for authorizing the use of data. Accordingly, the use-compensation system was enacted as "a single statutory grant of jurisdiction" which cannot be severed. *See Northern Pipeline*, 458 U.S. at 87 n.40.

Permitting the use of data in the absence of a procedure for obtaining compensation would have provided me-too applicants the "free ride" that Congress intended to prevent. *See* S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4091-92. The district court's injunction against the use of data thus effectuated rather than contravened congressional intent. *Sathon, Inc. v. American Arbitration Association*, No. 83 C 6019, slip op. at 6, 9 n.6 (N.D. Ill. Mar. 30, 1984) (me-too applicant estopped from challenging duty to pay compensation as determined through arbitration after using another company's data to obtain me-too registration). Enjoining the use of data, therefore, was the only proper relief the district court could have granted to effectuate the congressional purpose.

B. The Arbitration Scheme Cannot Be Saved By Severing The No-Review Clause

EPA's simplistic proposal is to "save" the arbitration scheme by striking FIFRA's no-review clause. (J.S. at 15-16.) But to create a right of judicial review where Congress expressly prohibited it would move the Court into the role of legislator. Because Congress plainly declared its intent to prohibit judicial review, and to keep compensation disputes out of the federal courts, the responsibility to remedy the arbitration scheme lies with Congress, not the judiciary. Furthermore, severance of the no-review provision would not cure the statute. Merely to strike the clause would create a vacuum rather than a right of review. The decisions of this Court hold that 28 U.S.C. § 1331 does not, in and of itself, create a right of appellate review in

Article III courts. In order to create such a right, the Court would have to overstep its judicial role and engage in lawmaking to construct an arbitration scheme that conforms to the requirements of Article I and Article III.

Whether the no-review clause can be severed from the arbitrator compensation provision is in the first instance a question of congressional intent. *Lynch v. United States*, 292 U.S. 571, 586 (1934). Here, FIFRA clearly commands that no review be permitted and forecloses any debate about Congress' intent. A statute which expressly prohibits judicial review may not be rewritten by the courts in order to cure a constitutional defect. *Swain v. Pressley*, 430 U.S. 372, 376-78 (1977). FIFRA's preclusion of judicial review is "sufficiently plain to require [the Court] simply to read it as it is written." *Id.; see also Lewis v. United States*, 445 U.S. 55, 65 (1980). "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981); *United States v. Sullivan*, 332 U.S. 689, 693 (1948).

Despite the plain language of the statute itself, EPA contends that "there is nothing in the legislative history to suggest that Congress would have failed to enact the [arbitration] provision without such a limitation [on judicial review]." (J.S. 16.) To the contrary, the legislative history merely confirms that one of Congress' purposes in restructuring § 3(c)(1)(D) in 1978 was to remove the determination of compensation from the realm of the judiciary. The no-review clause was an integral part of this congressional scheme.

Prior to 1978, FIFRA provided that compensation was to be determined by EPA with a right of appeal to the federal district courts. (J.S. App. 7a-8a); *Ruckelshaus v. Monsanto*, 104 S. Ct. at 2868. The 1978 FIFRA amendments removed the government from the compensation procedure, vested final and conclusive adjudicatory power in arbitrators, and

barred any appeal or judicial review. The purpose of this change was to implement Congress' belief that compensation "should be determined to the fullest extent practicable, within the private sector," and that the determination should "not require active governmental involvement." 123 Cong. Rec. 25,710 (1977) (statement of Sen. Leahy). Thus Congress' intent in restructuring § 3(c)(1)(D) in 1978 was to remove the adjudication of compensation claims from federal courts and agency officials.

The contrast between FIFRA and other arbitration schemes established by Congress confirms the legislative purpose to tailor the judicial review provision of each scheme to the nature of the dispute it was designed to resolve. Where judicial review was desired, it was provided for.[24] Where it was not desired, it was not provided for, or was narrowly limited.[25] In all instances where Congress did not provide for or narrowly limited judicial review, the arbitration was consensual or involved public rights, *i.e.*, rights against a government entity.

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[24] Congress provided for judicial review of arbitration awards arising from disputes under the Multi-Employee Pension Plan Amendments *Act of 1980* (*see* 29 U.S.C. § 1401(b)(2)); of arbitration awards arising from the removal or reduction in grade of federal employees under the Civil Service Reform Act of 1978 (*see* 5 U.S.C. § 7121(f)); of arbitration awards arising from grievances of licensees under the blind facility program under the Rehabilitation Act Amendments of 1974 (*see* 20 U.S.C. § 107d-2(a)); and of arbitration awards arising from claims asserted against the "Superfund" under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (*see* 42 U.S.C. § 9612).

[25] Congress made no provision for judicial review of arbitration awards arising from claims against the Overseas Private Investment Corporation under the Overseas Private Investment Corporation Amendments Act of 1981 (*see* 22 U.S.C. § 2197); of arbitration awards arising from design competitions in the procurement of aircraft designs by the armed forces (*see* 10 U.S.C. § 2271); or of arbitration awards arising from claims brought by subcontractors against prime contractors whose war contracts were terminated under the Contract Settlement Act of 1944 (*see* 41 U.S.C. § 113(f)).

The FIFRA arbitration scheme is unique. It is the only scheme devised by Congress which compels arbitration as the exclusive means for resolving disputes between private parties concerning private rights. And, it is the only scheme which expressly *prohibits* judicial review of private rights disputes. The prohibition of judicial review of FIFRA arbitrations was a deliberate act designed to keep the disputes out of the courts.

Thousands of FIFRA compensation offers are pending, each representing a potential arbitration. For this Court to second guess Congress and create a right of judicial review would risk clogging the courts with data compensation litigation, a result Congress clearly wanted to avoid. Had it been aware of the constitutional implications, Congress may well have devised an approach radically different from the arbitration scheme. Indeed, in 1982, the House of Representatives, joined by the Senate Committee on Agriculture, Nutrition and Forestry, approved legislation that would have abandoned the arbitration system altogether and replaced it with different forms of research incentives and protections for proprietary rights. *See* S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982).

The no-review clause thus is an inextricable part of the existing arbitration scheme. Striking the no-review clause would defeat the congressional purpose of reassigning the determination of compensation to private arbitrators and removing the courts from compensation litigation. Congress would not have intended that scheme to stay in force absent a no-review clause. As a result, the clause is not severable from the remainder of the arbitrator compensation system.[26]

---

[26] FIFRA's "severability" provision, 7 U.S.C. § 136x (1982) is not a blanket authorization to fragment otherwise indivisible provisions of the Act. A severability provision does not take precedence over congressional intent to keep a statutory provision intact. "[T]he ultimate determination on severability will rarely turn on the presence or

(Continued on next page)

Furthermore, even if severance were permissible, it would not cure the statute. Merely to strike the no-review clause would not in itself create a right of judicial review; it would only produce a statutory void. EPA's assertion that a right to review of FIFRA arbitration decisions would arise under 28 U.S.C. § 1331 (J.S. at 15) is unsupportable. That statute does not create a right of action; it merely confers jurisdiction where such a right already exists. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). Futhermore, *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), cited by EPA, merely recognizes jurisdiction under § 1331 *to enforce* an award of an airline board of adjustment, *created by contract* under the Railway Labor Act, *whose decisions were final and binding upon the parties.* It recognized no right of review of the substance of the award. To the contrary, this Court has held that no right of judicial review of an arbitrator's decision arises under § 1331. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 301-306 (1943).

In addition, merely striking FIFRA's no-review clause would not begin to define the procedures or standards under which Article III review would be conducted. The Court would have to decide which Article III court should review the arbitration, would have to determine venue requirements, would have to decide what role the arbitra-

(Footnote 26 continued)
absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1967). FIFRA's severability provision states that the invalidity of one provision of the Act "shall not affect other provisions . . . *which can be given effect without regard to the invalid provision.*" FIFRA § 30 (emphasis added). That is not the case with § 3(c)(1)(D). Congress intended non-reviewable arbitration to be the exclusive means for resolving disputes concerning compensation for the use of data. Because Congress intended determination of compensation to be a private matter, the arbitration scheme enacted by Congress in 1978 cannot be given effect without the no-review clause.

tors should play as fact-finding adjuncts, and would have to establish a standard for appellate review.

In short, compliance with Article III would require a major overhaul of the arbitration scheme. Because the arbitrations adjudicate not only federal statutory rights, but also state law rights in trade secrets, "the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal. . . ." *Northern Pipeline*, 458 U.S. at 86 n. 39.

Further, striking the no-review clause would not supply the standards that are needed to guide the arbitrator's discretion, or a structure that would assure consistency and continuity. It would not cure the Article I violation.

Restructuring the arbitrator compensation scheme to resolve the Article I and Article III problems cannot be accomplished through statutory interpretation or through the deletion of language from the existing law. It is axiomatic that Congress, not the courts, has the power to legislate. But legislate is precisely what the Court would have to do to "save" this statute.[27]

[27] Other arbitration schemes devised by Congress demonstrate the complexity of establishing a right to judicial review. The degree of legislative discretion involved in this task makes it peculiarly inappropriate to create such a right by judicial action. The Civil Service Reform Act of 1978, for example, provides judicial review in the Court of Appeals for the Federal Circuit. 5 U.S.C. §§ 7121, 7703(b)(1). The Multi-Employer Pension Plan Amendments of 1980, 29 U.S.C. § 1401(b)(2), and the Comprehensive Environmental Response Cleanup and Liability Act of 1980, 42 U.S.C. § 9612(b)(4)(G), permit review in the district courts. The Rehabilitation Act Amendments of 1974, 20 U.S.C. § 107d-2(a), permit review under the standards delineated by the Administrative Procedure Act. The Multi-Employer Pension Plan Act establishes a presumption, rebuttable by a clear preponderance of the evidence, that the arbitrator's findings of fact are correct. 29 U.S.C. § 1401(c). The Civil Service Reform Act of 1978, on the other hand, requires the district court to set aside findings unsupported by substantial evidence. 5 U.S.C. § 7703(b)(1)(c)(3).

In light of the unconstitutionality of the arbitration scheme, it is likely that Congress will exercise its legislative discretion to amend the compensation system and effectuate the changes it initiated in 1982. Because the prohibition of judicial review is an integral part of the present scheme, and because legislative action is required to cure the constitutional deficiencies, that task cannot be accomplished by the courts. It is Congress' responsibility to restructure FIFRA "to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose." *Northern Pipeline*, 450 U.S. at 88 n.40.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

KENNETH W. WEINSTEIN
(Counsel of Record)

LAWRENCE S. EBNER
STANLEY W. LANDFAIR

McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

Attorneys for Appellees

Supreme Court, U.S.
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(3)

No. 84-497

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Appellees have not rebutted — indeed, they have conceded — the key factors that make their claim presently nonjusticiable.

Our jurisdictional statement pointed out (at 10-12) that although one appellee (Stauffer Chemical Company) had been a party to an arbitration under FIFRA, it was not seeking in this case (or in the separate case brought by its opponent in the arbitration) to change the substance of its arbitral award in any way. Thus, even Stauffer cannot meet the threshold requirement that it show an actual injury and that the requested relief would redress the claimed injury. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-73, 81 (1978).

Appellees confirmed our position when they informed the district court that they "do not challenge the result of any arbitration, nor does the adjudication of [their] claims depend in any manner on the outcome of an arbitration." Memorandum in Support of Plaintiffs' Motion for Reentry of Judgment at 6 (July 16, 1984). They echo that statement in this Court when they argue (Mot. to Aff. 12) that this case does not challenge FIFRA's arbitration scheme but is directed instead against FIFRA's data consideration provisions.

Our point thus stands unchallenged: Appellees seek no relief that would change the result of any arbitration. The fact that Stauffer participated in one such proceeding (in which it obtained a favorable result) is accordingly of no significance. So long as no appellee claims that it has engaged in an arbitration that failed to "vindicate its statutory right to obtain compensation,"[1] their legal claim is no more justiciable than was the identical claim this Court rejected as premature in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984) slip op. 31.

It is insufficient for appellees to allege that Stauffer was "aggrieved" because it was awarded $50 million less than it claimed in its arbitration with PPG Industries, Inc. Wholly absent from the forms of relief Stauffer seeks in this case (and in its defense of PPG's separate case in the United States District Court for the District of Columbia) is a suggestion that the amount it was awarded in the arbitration should be altered.[2] Accordingly, Stauffer is not

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[1]This Court stated in *Ruckelshaus* v. *Monsanto, Co.*, No. 83-196 (June 26, 1984) slip op. 31 (emphasis added) that "the operation of the arbitration procedure affects *only* [the data submitter's] ability to vindicate its statutory right to obtain compensation from a subsequent applicant."

[2]Contrary to appellees' contention (Mot. to Aff. 10, 14), EPA did not concede the correctness of the district court's finding that Stauffer was "aggrieved" by the alleged $50 million shortfall. These findings of fact

"aggrieved" by the amount of the award in any way that it chooses to bring before the federal judiciary. Without such a request for relief, the happenstance of a past arbitration adds nothing to appellees' contention that this case presents a justiciable setting for considering their constitutional claim.[3] Appellees would be in no different posture in this case if they had all participated in arbitrations and had been awarded every dollar claimed.

2.a. Appellees suggest (Mot. to Aff. 17-18) that the Article III claim is especially strong because the arbitrators will be adjudicating state law trade secret rights. The premise of this argument, however, is faulty. Appellees' claim is that the data may contain valuable trade secret techniques protected by state law; however, the compensation under the

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and conclusions of law were entered by the court on appellees' post-judgment motion under Rules 52(b) and 59(e), Fed. R. Civ. P., to alter or amend the judgment. The government opposed the entry of such findings and conclusions as inappropriate; alternatively, on the premise such action was warranted, the government objected to several conclusions of law as inconsistent with the previously entered judgment. While the government did state that it agreed "that no genuine issue as to any material facts exist in this action and *accordingly* does not contest any of plaintiffs' proposed findings of fact," the government expressly stated that "defendants in no way waive[d] their right to challenge all conclusions of law as well as certain factual findings on their appeal of the judgment of the Court." Memorandum of Law in Opposition to Plaintiffs Motion to Amend Judgment at 2, 3 & nn. *, * * (Aug. 29, 1984) (emphasis added).

[3]It is no excuse, as appellees suggest (Mot. to Aff. 14-15), that the statute limits judicial review of the award. Appellees' constitutional claim is that the arbitration scheme with the limitation on judicial review is unconstitutional. Contrary to what appellees appear to believe, there is no reason why a party seeking a declaration that a statute is invalid cannot ask for relief that may have been barred by the statute the party seeks to invalidate. This Court's decision in *Monsanto* requires a data submitter to exhaust the arbitration remedy before presenting constitutional attacks on the statutory process; appellees should not be allowed to evade this requirement by hiding behind the very statutory provision that is alleged to be unconstitutional.

statute is for the subsequent applicant's reliance on the data to obtain a registration, and not for its disclosure. Indeed, the subsequent applicant normally does not see the data but merely cites data referred to in a catalog compiled and published by EPA. Furthermore, if the subsequent applicant is a multinational firm, that company is prohibited by the statute from obtaining the data. 7 U.S.C. 136h(g). The right that is adjudicated in the arbitration is the federal right to compensation under the federal statute, not any right to trade secret protection provided by the state law. See *Monsanto*, slip op. 31. Consequently, the arbitrators are unlikely to decide any state law questions, much less any state law rights.

b. Appellees also argue (Mot. to Aff. 21-22) that their claim of improper delegation of legislative authority, which was not adjudicated below, would support the judgment. The gist of appellees' assertion is that Congress failed to provide standards for measuring the compensation due under the statute. There is no basis for this contention. The compensation provision was inserted in the statute in 1972, and provided for the right to "reasonable compensation for producing the test data to be relied upon." Pub. L. No. 92-516, § 3(c)(1)(D), 86 Stat. 979. The stated purpose was to spread the costs of data development (S. Rep. 92-838, 92d Cong., 2d Sess., Pt. II 69 (1972)). The intended measure of compensation was plainly the equitable division of those costs. In 1978, Congress substantially altered the procedural aspects of the arbitration and compensation scheme, assigning the determination of the amount of compensation to the parties and the arbitrators rather than to EPA. It is clear from the legislative history, however, that no change was intended in the expected measure of compensation. See S. Rep. 95-334, 95th Cong., 1st Sess. 7-8 (1977); 123 Cong. Rec. 25706 (1977) (emphasis added) (the scheme "protects the data developer's right *to recover his data generation costs* * * *") (remarks of Sen. Leahy).

c. Finally, appellees assert (Mot. to Aff. 28-29) that if FIFRA's severability clause is used to strike down the limitation on judicial review it will not have the effect of permitting judicial review of the award by an Article III court. This contention has no merit. Under 28 U.S.C. 1331 the district courts are vested with subject matter jurisdiction to enforce and review an arbitration award mandated by federal statute, and a cause of action to enforce or review an arbitration award may readily be inferred from the remainder of the statute and its history. See *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979). Nor does *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943), cited by appellees (Mot. to Aff. 28), stand for the broad proposition that there is no right of review of an arbitrator's decision under 28 U.S.C. 1331. That decision rested on the special circumstances surrounding jurisdictional disputes between labor unions and the clear congressional intent that such controversies be settled as promptly as possible. 320 U.S. at 301-303. No such considerations apply here. Indeed, the fact that FIFRA as written permits judicial review in limited circumstances evidences a general understanding that a cause of action would ordinarily exist if those limitations no longer applied.

For the foregoing reasons and those presented in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted. The Court may wish to consider summary reversal.

REX E. LEE
Solicitor General

NOVEMBER 1984

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No. 84-497

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JOINT APPENDIX

KENNETH W. WEINSTEIN
McKenna, Conner & Cuneo
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Counsel for Appellees

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellant

JURISDICTIONAL STATEMENT FILED SEPTEMBER 27, 1984
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In the Supreme Court of the United States

OCTOBER TERM, 1984

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PLAINTIFFS

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC.
Old Ridgebury Road, Sec. P-3
Danbury, Connecticut 06817

ABBOTT LABORATORIES
Abbott Park
North Chicago, Illinois 60064

CIBA-GEIGY CORPORATION
444 Sawmill River Road
Ardsley, New York 10502

E.I. DUPONT DE NEMOURS & CO.
1007 Market Street
Wilmington, Delaware 19898

FMC CORPORATION
2000 Market Street
Philadelphia, Pennsylvania 19103

RHONE-POULENC, INC.
P.O. Box 125
Black Horse Lane
Monmouth Junction, New Jersey 08852

ROHM AND HAAS COMPANY
Independence Mall West
Philadelphia, Pennsylvania 19105

STAUFFER CHEMICAL COMPANY
Nyala Farm Road
Westport, Connecticut 06881

UNIROYAL, INC.
Benson Road
Middlebury, Connecticut 06949

VELSICOL CHEMICAL CORPORATION
341 East Ohio Street
Chicago, Illinois 60611

ZOECON CORPORATION
975 California Avenue
Palo Alto, California 94304

PHILLIPS, NIZER BENJAMIN KRIM & BALLON
40 West 57th St.
N.Y.C. 10019 997-9700
Attorneys For Plaintiffs

DEFENDANTS

WILLIAM D. RUCKELSHAUS
Administrator, United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

and

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460

LEE VERSTANDIG, Acting Admin., U.S. Environmental Protection Agency et al.

U.S. ATTORNEY
1 Sta. Andrew Plaza
N.Y. N.Y.
Michael Dollinger

Date	Nr.	Proceedings
06-30-76	1	FILED COMPLAINT, ISSUED SUMMONS.
07-09-76	2	Filed summons & marshal's return. Served: Russell E. Train by certified mail Receipt #233906 on 7-2-76. United States Environmental Protection Agency by certified mail Receipt #233905 on 7-2-76. U.S. Attorney General Dept. of Justice, Washington, D.C. by certified mail Receipt #233904 on 7-2-76. U.S. Attorney, S.D.N.Y. on 7-2-76.
07-19-76	3	Filed Pltffs. Amended Complaint
07-26-76	4	Filed Pltffs. Motion of Rohm & Haas Corp., AmChem Products Inc. Stauffer Chemical Co. & FMC Corp. to Intervene. Ret. Sine Die.
07-26-76	5	Filed Pltffs. Memorandum in support of Motion of Rohm & Haas Corp., Amchem Products Inc. Stauffer Chemical Co. & FMC Corp. to intervene.
08-30-76	6	Filed Pltffs'. motion for leave to amend the complaint to add the U.S. Environmental Protection Agency as a party Deft.
08-30-76	7	Filed motion of the Upjohn Company for leave to intervene as a Pltff.
08-30-76	8	Filed memorandum of Upjohn Company in support of motion to intervene.
08-30-76	9	Filed affidavit of filing by Ira E. Wiener on 8-12-76, of the motion of Upjohn to intervene and memorandum in support of motion to intervene.
09-07-76	10	Filed affidavit & notice of motion of Uniroyal, Inc. for leave to intervene as a Pltff., ret. 10-1-76.
10-5-76		Filed memo endorsed on motion dated 8-30-76 ... Motion granted So ordered Owen J.

10-5-76		Filed memo endorsed on motion dated 7-26-76 ... Motion granted So Ordered Owen J.
10-5-76		Filed memo endorsed on motion dated 9-7-76 ... Motion granted So Ordered Owen J.
10-5-76	11	Filed stip & order consenting to motion to intervene etc. Owen J.
10-5-76	—	Filed memo endorsed on motion dated 8-30-76 ... Motion granted So ordered Owen J.
10-08-76	12	Filed stip & order re use of records and terminology to be used. Owen J.
11-17-76	13	Filed Ralston Purina Notice of Motion for order to serve an amended complaint. Ret. 11-24-76.
11-17-76	14	Filed REVISED 2nd Amended Complaint.
11-24-76	15	Filed stip and order of dismissal as to pltffs National Agricultural Chemicals Association So ordered Owen J.
12-1-76	16	Filed affidavit and notice of motion for order transferring matter to Dist of Columbia. ret. 12-16-76 at 2:15 PM
12-1-76	17	Filed memo of law in support of motion to transfer.
12-6-76	18	Filed stip and order motion of Ralston Purina to intervene by filing the proposed complaint is consented etc. Owen J.
12-6-76		Filed memo end. on motion dated 11-17-76 motion granted on stip. of parties So ordered R. Owen J.
12-13-76	19	Filed memo in opposition to defts motion to transfer.
12-16-76	20	Filed reply memo of law in support of defts motion to transfer.
12-16-76	21	Filed stip of substitution of Arthur Dry and Kalish for Cravath.
01-11-77	22	Filed notice of motion for leave to intervene as pltff by Rhodia. ret. sine die.

01-19-77	23	Filed stip and order consenting to intervention of Rhodia Inc. etc. Owen J.
01-24-77	24	Filed ANSWER of Deft Train and EPA (USA)
02-8-77	25	Filed 3rd amended complaint with affidavit of service by mail.
02-25-77	26	Filed memo and order ... deft motion to transfer to Dist of D.C. denied. So ordered Owen J. m/n
03-1-77	27	Filed ANSWER of deft Tranin [sic] and EPA (AUSA)
10-19-78		PRE-TRIAL CONFERENCE HELD BY Owen, J.
11-14-78	28	Filed stip and order pur. to Rule 14(a) FRCP, that the pltffs file their Fourth Amended Complt. consented by the defts ... Owen, J.
11-20-78	29	Filed stip and order, that the following schedule will be observed in developing & presenting pltffs' Motion for a preliminary injunction in this matter: Pltffs. will file their motion Ret: 1-5-79, on 11-24-78; Defts will file their opposition to pltffs' motion on 12-15-78 & Pltffs will file their reply to defts' opposition on 12-26-78 ... Owen, J.
11-20-78	30	Filed stip and order pur. to Rule 14(a) FRCP, that the pltffs file their Fourth Amended Complt. & that the defts. consent to the filing thereof. The parties further stipulate to the voluntary dismissal of pltff. Stauffer Chemical Co. without prejudice & without costs ... Owen, J.
11-20-78	31	Filed pltffs FOURTH AMENDED COMPLAINT for Declaratory Judgt. & Injunction.
12-6-78	32	Filed pltffs. NOTICE OF MOTION for Preliminary Inj., as is set forth more fully in the attached motion & memorandum in support of the motion, pltffs assert that the 5th Amendment to the US Constitution renders void Sections 3 and 10 of the Federal Insecticide, etc. Ret: 1-12-79 at 10:00 a.m.

12-06-78	33	Filed MOTION of pltffs for Preliminary Inj. in this matter enjoining the defts. the US Envrionmental Protection Agency & its Admin. Douglas M. Costle etc.
12-6-78	34	Filed pltffs' PRELIMINARY INJUNCTION.
12-6-78	35	Filed pltffs' AFFIDAVITS.
12-6-78	36	Filed MEMORANDUM OF Pltffs in support of motion for preliminary inj.
12-26-78	37	Filed stip and order, 1/Certain exhibits to one of the affdvts. by pltffs. in support of their Motion for Prel. Inj. are considered by pltffs. to be trade secrets; 2/Exhibits 4&5 of John Boehle, Jr's Affdvt. entitled "Summary Sheets of Atrazine Data in EPA Submissions etc. 3/Pltffs seek & defts consent entry of an order by the Court. pur. to Rule 26(c)(7) FRCP permitting pltffs to submit exhibits for hearing etc. 4/By consenting the entry of this order, defts do not in any way concede that the exhibits are, trade secrets or that they are entitled to protection as such under any law.... Owen, J.
01-22-79	—	Filed MEMO ENDORSED on LETTER dated 1-10-79 to Judge Owen, J. from Jacqueline M. Warren (Staff Attny.) The application is granted. So ordered Owen, J. m/n
01-22-79	38	Filed Pltffs response to Request of the Environmental Defense Fund to file a Brief Amicus Curiae.

01-23-79	39	Filed MEMORANDUM of Amicus Curiae Environmental Defense Fund, in opposition to pltffs' Motion for Preliminary Injunction. (Jacqueline M. Warren attny. for amicus curiae)
01-24-79	40	Filed USA's AFFDVT. in opposition of Douglas D. Campt. with Affdvts. attached.
01-24-79	41	Filed defts MEMORANDUM OF LAW in opposition to pltffs' Motion for a Preliminary Injunction.
01-24-79	42	Filed ANSWER of defts. Douglas M. Costle & the Environmental Protection Agency. TO THE Fourth Amended Complt. (RBF)
02-1-79	43	Filed U.S.A.'s AFFIDAVIT of Marvin A. Schneiderman.
02-16-79	44	Filed pltffs' Notice of Application for Temporary Restraininig Order.
02-20-79	45	Filed pltffs' REPLY MEMORANDUM in support of motion for preliminary injunction.
03-22-79	46	Filed stip and order, Notice has been provided to the defts' counsel in writing that such applications are believed to rely on a pltff's trade secret data. deft' will not issue any such registration for a pesticide containing a "specified active ingredient" which a pltff. has submitted research & test data claimed to constitute a trade secret etc. Defts may terminate any part of this agreement by providing 15 days prior notice in writing to pltffs' counsel. So ordered Owen, J.
04-9-79	47	Filed Notice of APPEARANCE, that Robert L. Ackerly as *Pltffs' attny.* (SCC)
04-11-79	48	Filed *FIFTH AMENDED COMPLAINT* for Declaratory Judgment and Injunction, of pltffs'.

04-11-79	49	Filed Stip and order, that pltffs may amend their complt. by filing the fifth Amended Complt. adding the Union Carbide Corp. & Stauffer Chemical Co. as pltffs. Named pltffs' shall be subject to all motions, stips. agreements etc. the defts' are not required to file any further answer to the Fifth Amended Complt. So ordered Owen, J.
06-13-79	50	Filed transcript of record of proceedings, dated 2-23-79
07-10-79	51	Filed OPINION #48837, Pltffs request of Preliminary Injunction restraining the Environmental Protection Agency from disclosing research date which was submitted to govt. agencies in support of various pesticide applications & which pltffs. consider to be trade secrets. Act, 7 U.S.C. § 136 et seq. Trade Secrets Act, 18 U.S.C. § 1905 prohibits the unauthorized disclosure of trade secrets by agency officials & makes such disclosure punishable as a crime. The Prel. Inj. restraining the Environmental Protection from disclosing trade secret research etc. is granted pending a trial on the merits herein. In the circumstances of this case a bond is not required. The parties are to appear on 8-14-79, at 4:30 P.M. in room 2804 to fix a date for trial on the merits. Submit order on Notice. Owen, J. m/n
07-12-79	52	ERROR
08-15-79	53	Filed pltffs' Preliminary Injunction, Ordered that pending a trial on the merits on pltffs' application for a declaratory judgt. & permanent inj. the defts and their agents, officers & other subordinates & all other persons are enjoined & restrained from disclosing any pltff's

claimed trade secret research or test data as so stated. Owen, J.

09-4-79 54 Filed stip and order that pltffs' may file the Supplement to the FIFTH AMENDED COMPLT. effecting the intervention of E.I. du Pont de Nemours & Co. & Velsicol Chemical Corp. as pltffs. All orders, stips. & agreements previously filed shall be effective as to E.I. du Pont & Velsicol Chemical Corp. *The defts shall not be required to answer or respond to the Supplemental Fifth Amended*. So ordered. Owen, J.

09-14-79 55 Filed defts' NOTICE OF APPEAL TO THE SUPREME COURT—from an order filed 8-15-79 granting a preliminary injunction. m/copies to Sellers, Conner & Cuneo—Arthur, Dry & Kalish on 9-20-79.

09-14-79 56 Filed defts' NOTICE OF APPEAL to the USCA for the Second Circuit from an order filed 8-15-79, granting a preliminary injunction. This appeal is taken pur. to 28 U.S.C. §§1252 and 2101 m/copies to Sellers, Conner & Cuneo—Arthur, Dry & Kalish on (9-20-79).

10-9-79 57 Filed letter Michael H. Dolinger Asst. U.S. Atty. Tele. No. 1968 dtd. 2/20/79 to Judge Owen. Re: whether any injunctive relief of nature sought be issued, etc. or 3 Judge Court. etc.

10-3-79 58 Filed true copy of Mandate re: Stip. & Order from USCA. Stip. that the appeal be and it hereby is withdrawn without prejudice to reinstatement within twenty days after the Supreme Court of the U.S. has acted finally on appellants' direct appeal now pending before it purs. to 28 USC 1252 and a Notice of Appeal filed 9-14-79. If the appeal to this Court

is not thus reinstated, it shall be deemed withdrawn with prejudice ... Clerk. USCA.

10-12-79 59 Filed stip and order, that pltffs may file the aforesaid Supplement to the Fifth Amended Complaint, attached hereto, effecting the intervention of Abbott Labs. as a pltff in this action. All orders, stips. and agreements' previously filed in this action shall be affected as to Abbott Labs. The defts shall not be required to answer or otherwise respond to the Supplement to the Fifth Amended Complt. So ordered Owen, J.

12-4-79 60 Filed USA's Notice of Reinstatement of Appeals.

12-6-79 61 Filed stip and order, that the Notice of Appeal to the United States Supreme Court filed by defts. on 9-14-79 is dismissed. So ordered Owen, J.

12-26-79 62 Filed stip of VOLUNTARY DISMISSAL & of Intervention, & Order, *Pltff Ralston Purina is dismissed without prejudice* pur. to Rule 41(a) FRCP. Pltffs may file the Supplement to the 5th Amended complt. etc. All orders stips & agreements previously filed shall be effective as to Sandoz, Inc. The defts shall not be required to answer or respond to the Supplement to the Fifth Amended Complt. So ordered Owen, J.

12-28-79 63 Filed *SUPPLEMENT TO FIFTH AMENDED COMPLAINT*—for Declaratory Judgt. & Injunction by Sandoz, Inc.

12-21-79 64 Filed Certification of record on appeal to the USCA for the Second Circuit.

10-14-80 65 Filed AFFDVT. & NOTICE OF MOTION For Salsbury Labs. Inc., pur. to Rules 24 & 25, FRCP joining Salsbury Labs.

		as a party to this action as partial successor in interest to pltff Rhone-Poulenc, Inc. etc. Ret: 10-24-80 at 9:30 a.m. room 128
—	10-14-80	66 Filed MEMORANDUM in support of motion of Salsbury Labs. Inc. for partial substitution & intervention.
	11-18-80	— Filed MEMO ENDORSED on document #65, The motion is granted etc. Owen, J. m/n
	12-2-80	67 Filed ORDER, Ordered that Salsbury Laboratories, Inc. & is joined as a party to this action as partial successor in interest to pltff Rhone-Poulence, Inc. & Ordered that Salsbury Labs. Inc. be granted full status as a pltff-intervenor in this action Owen, J. m/n
	03-3-81	68 Filed ORDER Ordered that this action is transferred to the suspense docket. So Ordered Owen, J. copy to Ray S.
	04-9-81	69 Filed true copy of USCA MANDATE with Opinion, Ordered that Judgt. of Dist. Court is reversed in accordance with the opinion of this court with costs to be taxed against the pltffs-appellees. Docketed as a Judgt. #81,0394 with Bill of COSTS, Taxed in favor of Deft. Appellants in the sum of $1,649.13
	04-22-81	70 Filed true Copy of ORDER from *Supreme Court of the U.S.* Ordered that the effect of the order of this Court denying the petition for a writ of certiorari in this action & the same is hereby, suspended pending the *timely* filing & disposition of a petition for rehearing.
	04-28-81	71 Filed MINUTE ORDER pur. to MEMORANDUM from the Admin. Office dtd. 6-15-73. The Clerk is instructed to submit a JS-6 form. So ordered Chief Judge MacMahon.

	05-14-81	72 Filed pltffs' NOTICE OF MOTION, pur. to Rules 40 and 65, FRCP accelerating the trial of this case, granting a prel. inj. restraining defts from publicly dislosing the trade secret research data submitted to them by pltffs etc. Ret: 5-22-81 at 2:15 p.m. room 128.
	05-14-81	73 Filed MEMORANDUM OF PLTFF's in support of motion for acceleration of Trial, for Prel. Inj. & for consolidated Hearing.
	05-14-81	74 Filed AFFDVT. of Charles O. O'Brien
	05-14-81	75 Filed AFFDVT. of Samuel J. Talucci.
	05-14-81	76 Filed AFFDVT. of Haney B. Camp.
	05-14-81	77 Filed AFFDVT. of George Ray Ferguson.
	05-14-81	78 Filed AFFDVT. of Donald E. Rosen.
	05-14-81	79 Filed AFFDVT. of Harry W. Hays.
	05-14-81	80 Filed AFFDVT. of G. Gregor Rohwer.
	05-15-81	81 Filed AFFDVT. by Michael H. Dolinger in opposition to the motion of pltffs.
	5-19-81	82 Filed govt's. MEMORANDUM OF LAW in opposition to pltffs' Motion for a Prel. Inj. and Accelerated Trial.
	05-21-81	83 Filed SUPPLEMENTAL MEMORANDUM of pltffs' on the authority of the court to grant Interim relief. (sent to chambers)
	05-21-81	84 Filed defts' MEMORANDUM OF LAW in Reply to pltffs' "Supplemental Memorandum"
	05-22-81	85 Filed stip and order of Voluntary Dismissal as to Pltff. Salsbury Laboratories, Inc. ONLY, is dismissed without costs to any party. So ordered Owen, J.
	06-15-81	86 Filed ORDER, Ordered that the prel. Inj. order ent. 8-15-79 is Vacated. Pierce, J. m/n
	06-16-81	87 Filed REPLY MEMORANDUM of pltffs. in support of Motion for Acceleration of

Trial, for a Prel. Inj. & for a Consolidated Hearing.

06-15-81 — Filed MEMO ENDORSED ON Document #72—The motion is denied except to possible acceleration of the trial which will be the subject of a conference of counsel & this Court on 6-19-81, at 11:30 a.m. in room 128. So ordered Owen, J. m/n

07-7-81 88 Fld stip & order re procedures to be employed during pendency of this action re disclosure OWEN J

07-27-81 89 Filed transcript of record of proceedings, dated 5-19-81

08-19-81 90 Filed *CONFIDENTIALITY STIP & ORDER*, that all affdvts. filed herein, exhibits & other materials marked "confidential" shall be held *in camera* by the Court & filed UNDER SEAL with the Clerk, etc. as indicated. So ordered Owen, J.

08-19-81 91 Filed stip and order of voluntary Dismissal of SANDOZ, INC., dismissed with prejudice but without costs etc. So ordered Owen, J.

09-2-81 92 Filed plffs' AFFDVT. & NOTICE OF MOTION for summary judgt. pur. to Rule 56 FRCP that sections 10 and 3(c)(1)(D) of the Federal Insecticide, Fungicide & Rodenticide Act, etc. Further Notice that, by stip. opposing papers are to be served on or before 9-25-81. Ret: 10-2-81 at 2:15 p.m.

09-2-81 93 Filed CONFIDENTIAL AFFDVTS. IN LARGE Brown folder Sealed & Impounded & placed in VAULT. Set A-original (1 of 2)

09-2-81 94 Filed CONFIDENTIAL AFFDVTS & MEMORANDUM in support, in LARGE Brown folder Sealed and Impounded & placed in VAULT. Set A-original (2 of 2).

09-3-81 95 Filed stip & order, for Amendment of the Fifth Amended Complt. Dismissal of certain counts therein, etc. as indicated.

10-7-81 96 Filed stip and order adj. pltffs' motion for summary judgt. to 10-21-81 same time & place & defts. shall serve answering papers on 10-15-81. So ordered Owen, J.

10-22-81 97 Filed stip and order that pltffs' motion for summary judgt. be adj. to 12-4-81. defts. shall serve answering papers 10-26-81 & pltff shall serve answering papers 11-20-81. So ordered Owen, J.

10-27-81 98 Filed defts' affdvt & notice of motion for an order dismissing the complt ... ret: 12-4-81

10-27-81 99 Filed defts' memo of law in support of motion to dismiss or summ. judg. and in opp. to pltff's motion for summ. judg.

10-27-81 100 Filed defts' response to pltffs' statement purs. to rule 3(g).

10-27-81 101 Filed defts' affdvt of Robert Forrest.

10-27-81 102 Filed defts' affdvt of Nancy B. Broff.

10-27-81 103 Filed defts' affvt of Therese Murtagh.

10-27-81 104 Filed defts' affdvt of Richard Schmitt.

10-27-81 105 Filed defts; affdvt of Michael H. Dolinger.

11-10-81 106 Filed pltffs' request for production of documents.

12-1-81 107 Filed stip and order adj. summary judgt. motions to 12-18-81. So ordered Owen, J.

12-3-81 108 Filed pltffs' Response to defts' Statement pur. to Rule 3(g).

12-3-81 109 Filed defts' Rule 34 Response & Objections.

12-9-81 110 Filed pltffs' AFFDVT. & MOTION to compel Production of Pesticide Labels pur. to 37(a) FRCP compelling defts to produce for inspection & copying all doc-

uments in their possession etc. Ret: 12-18-81 at 2:15 p.m.

12-9-81 111 Filed AFFDVT. of Richard L. Conn for pltffs.

12-9-81 112 Filed REPLY MEMORANDUM of pltffs. in support of Motion for summary judgt. & in opposition to defts' Motion to dismiss or for summary judgt.

12-16-81 113 Filed REPLY MEMORANDUM OF LAW in support of defts.' Motion to dismiss or for summary judgment.

12-23-81 114 Filed Stip and order that the Return date of the parties' respective summary judgt. motions in adj. to 12-18-81. So ordered Owen, J.

01-15-82 115 Filed AFFDVT. to Michael H. Dolinger for USA.

03-16-82 116 Filed transcript of record of proceedings, dated 1-15-82

03-3-83 117 Filed pltffs' NOTICE OF MOTION pur. to Rule 15(a) FRCP to amend their complt to dismiss Court I thereof without prejudice. Ret: 3-21-83

03-3-83 118 Filed pltffs' NOTICE OF MOTION or leave to file supplemental Memorandum in support of motion for summary judgt. Ret: 3-21-83

03-3-83 119 Filed SUPPLEMENTAL MEMORANDUM of pltffs in support of Motion for summary judgt.

03-21-83 120 Filed MEMORANDUM OF LAW in opposition to pltffs' Motion to dismiss Count 1 without prejudice

04-4-83 121 Filed REPLY BRIEF of pltffs. in support of Motion for Leave to dismiss Count 1.

04-14-83 122 Filed defts' SUPPLEMENTAL MEMORANDUM OF LAW in opposition to pltffs' Motion for summary judgt.

05-2-83 123 Filed stip and order of Voluntary Dismissal of the Upjohn Co. & Order dismisses its claims against the defts. So ordered Owen, J.

05-2-83 124 Filed stip and order of Intervention of Zoecon Corp. shall hereby intervene as a pltff. in this action & plead as its claim the aforesaid count V of the complt. as amended by order dated 8-31-81. So ordered Owen, J.

05-19-83 125 Filed SUPPLEMENTAL REPLY MEMORANDUM of pltffs. in support of motion for Summary Judgt.

06-20-83 126 Filed pltffs' Reply to defts' Letter to the Court of 6-6-83. (ADK)

07-29-83 127 Filed OPINION & ORDER #55042, This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III. Submit order on notice effectuating the foregoing. Owen, J. m/n

09-19-83 128 Filed MEMORANDUM of pltffs. in opposition to defts' Proposed Judgment.

09-27-83 129 Filed defts' REPLY MEMORANDUM in support of their Proposed Judgt.

09-30-83 130 Filed pltffs' REPLY MEMORANDUM in support of Proposed Judgt.

10-11-83 131 Filed defts' MEMORANDUM in opposition to pltffs' Modified Proposed Judgt. for USA

10-12-83 132 Filed pltffs' REPLY MEMORANDUM in support of Proposed Judgt. as Modified.

10-17-83 133 Filed defts' sur-reply memorandum in support of their proposed Judgment.

10-19-83 134 Filed Pltffs' Response to defts' Sur-Reply Memorandum.

11-30-83 135 Filed JUDGT. & ORDER, Ordered that the provisions for determination of compensation of section 3(c)(1)(D) Fed. Insecticide, Fungicide & Rodenticide Act,

as amended by the Federal Pesticide Act etc. Ordered that summary judgt. is ent. in favor of the defts & Count I of the amended complt. is dismissed with prejudice. Each party to bear its own costs. Owen, J. judgt. ent. 11-30-83—Clerk ... ent. 11-30-83 m/n

12-21-83 136 Filed USA's NOTICE OF APPEAL from the judgt. ent. on 11-29-83 to the U.S. Supreme Court Wash. D.C. Mailed copies to Kenneth Weinstein, Esq. (McKenna, Connor & Cuneo (1575 Eye St., N.W. Wash. D.C. 20005—Sidney Howell, Esq. (Arthur, Dry & Kalish 1230 Ave. of the Americas N.Y.C.

12-21-83 — Forwarded copy of Notice of Appeal to Dist. Judge & copy of N of A & Docket entries to Court of Appeals

01-3-84 137 Filed MEMO ENDORSED on Letter dated 12-16-83 from McKenna, Conner & Cuneo ... On these papers I see no Loss for the relief requested. The application is therefor denied. Owen, J. m/n

07-17-84 138 Filed pltffs' NOTICE OF MOTION for Leave to Amend Complt pur. to Rules 15(b) and (d) FRCP. Ret: 7-25-84

07-17-84 139 Filed pltff's NOTICE OF MOTION for Reentry of Judgt. on the grounds set forth in the attached memorandum of law & affdvt. of Andrew F. Fink dated 7-13-84.

07-17-84 140 Filed MEMORANDUM in support of pltffs' Motion for Leave to Amend Complt.

07-17-84 141 Filed MEMORANDUM IN SUPPORT OF pltffs' Motion for Reentry of Judgt.

07-17-84 142 Filed SUPPLEMENTAL AFFDVT. of Andrew F. Fink for pltff.

07-18-84 143 Filed pltff's AMENDED COMPLAINT for Declaratory Judgt. & injunction.

07-23-84 144 Filed Notice of MOTION for Preliminary Injunction as set forth in the proposed ordered order which is attached hereto. Ret: 7-25-84.

07-23-84 145 Filed MEMORANDUM In support of pltffs' Motion for a Preliminary Injunction.

07-24-84 146 Filed SECOND SUPPLEMENTAL AFFDVT, of Andrew F. Fink.

07-24-84 147 Filed SUPPLEMENTAL MEMORANDUM in support of pltffs' Motion for a prel. Inj.

07-26-84 148 Filed defts. NOTICE OF MOTION granting summary judgt. to the defts pur. to Rule 56 FRCP Ret: 7-25-84.

07-26-84 149 Filed MEMORANDUM OF LAW. in opposition to pltffs' Motions for a Prel. Inj. & for Reentry of Judgt. & in support of defts' Motion to Dismiss or for summary Judgt.

07-31-84 150 Filed MEMORANDUM & ORDER, In order to enable the Court to carry out the mandate of the Supreme Court all conduct which would constitute a change in position of the parties herein is to be stayed for 10 days. Stay may be granted upon application to the Court. So ordered. Owen, J. m/n

08-7-84 151 Filed *JUDGMENT & ORDER*, Ordered that the provisions for the determination of compensation of section 3(c)(1)(D) etc. of the Federal Insecticide, Fungicide etc. as indicated. Ordered that deft. *Wm. Ruckelshaus* as Administrator of the U.S. EPA, & his officers agents etc. are permanently enjoined as indicated. Owen, J. m/n EOD 8-8-84

08-8-84 152 Filed true copy of Supreme Court of the U.S. Order, Ordered that the judgt of the US Dist. Court is vacated & this

cause is remanded ... for the So. Dist. of N.Y. for further consideration etc.

08-17-84 153 Filed pltffs' NOTICE OF MOTION to amend the Judgt. in accordance with the proposed Findings of Fact, Conclusions of Law & Order submitted herewith.

08-17-84 154 Filed MEMORANDUM in support of pltff's Motion to Amend Judgt.

08-20-84 155 Filed defts' NOTICE OF MOTION pur. to Rule 62(c) FRCP staying the effect of its 8-7-84 Judgt. & Order in its entirety or staying the effect of its judgt. & order, Ret: 9-4-84

08-20-84 156 Filed MEMORANDUM OF LAW in support of defts' Motion for stay of judgt.

08-30-84 157 Filed MEMORANDUM of pltffs in opposition to defts' Motion for Stay of Judgt. Pending Appeal.

08-30-84 158 Filed MEMORANDUM OF LAW in opposition to pltffs' Motion to Amend the Judgt.

09-5-84 159 Filed MEMO ENDORSED with Notice of Motion pur. to Rule 62(c) FRCP, STAYING the effect of its 8-7-84 Judgt. & Order in its entirety etc. Ret: 9-4-84 ... On the entire record & Motions of this action the motion is denied ... Owen, J. m/n

09-5-84 160 Filed stip and Order that the firm of Phillips, Nizer, Benjamin, Krim & Ballon is substituted in place of Arthur Dry & Kalish for the pltff with supporting Affdvt.

09-5-84 161 Filed SUPPLEMENTAL FINDINGS OF FACT, CONCLUSION OF LAW & ORDER, Accordingly the Court will enter judgt. upon the following findings of fact & conclusions of law: Pltff Stauffer Chemical Co. submitted substantial research data to EPA in support of

pesticide registrations for products containing burylate & EPTC as well as other active ingredients ... etc. as so indicated. Owen, J. m/n

09-6-84 162 Filed defts' NOTICE OF APPEAL to the *U.S. Supreme Court Wash. D.C.* from judgt. dtd. on 8-7-84 & 9-4-84 ... Mailed copies to KENNETH WEINSTEIN, ESQ. 1575 Eye St. N.W. Wash. D.C. 20005 and Alan Zetterberg Esq. 40 W. 57th St. N.Y.C. 10019

09-7-84 — Forwarded copy of Notice of Appeal to U.S. Supreme Court and Copy of Notice of Appeal to Dist. Judge & copy of Notice of Appeal & docket entries to Court of Appeals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC.
Old Ridgebury Road, Sec. P-3
Danbury, Connecticut 06817,

ABBOTT LABORATORIES
Abbott Park
North Chicago, Illinois 60064

CIBA-GEIGY CORPORATION
444 SAWMILL RIVER ROAD
ARDSLEY, NEW YORK 10502,

E.I. DUPONT DE NEMOURS & CO.
1007 MARKET STREET
WILMINGTON, DELAWARE 19898

FMC CORPORATION
2000 Market Street
Philadelphia, Pennsylvania 19103,

RHONE-POULENC, INC.
P.O. BOX 125
Black Horse Lane
Monmouth Junction, New Jersey 08852

ROHM AND HAAS COMPANY
Independence Mall West
Philadelphia, Pennsylvania 19105

STAUFFER CHEMICAL COMPANY
Nyala Farm Road
Westport, Connecticut 06881,

UNIROYAL, INC.
Benson Road
Middlebury, Connecticut 06949

VELSICOL CHEMICAL CORPORATION
341 East Ohio Street
Chicago, Illinois 60611,

and

ZOECON CORPORATION
975 California Avenue
Palo Alto, California 94304, Plaintiffs,

v.

WILLIAM D. RUCKELSHAUS
Administrator, United States Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20460,

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460, Defendants.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION
76 Civ. 2913 (RO)

JURISDICTION

1. This action arises under the Constitution of the United States, and under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1982) (hereinafter "FIFRA"). This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) (1982).

THE PARTIES

2. Plaintiffs are developers and marketers of pesticides.

3. Union Carbide Agricultural Products Company, Inc. is incorporated in the State of Pennsylvania and does business in the State of New York.

4. Ciba-Geigy Corporation is incorporated in the State of New York and resides within this judicial district.

5. Abbott Laboratories is incorporated in the State of Illinois and does business in the State of New York.

6. E.I. DuPont de Nemours is incorporated in the State of Delaware and does business in the State of New York.

7. FMC Corporation is incorporated in the State of Delaware and does business in the State of New York.

8. Rhone-Poulenc, Inc. is incorporated in the State of New York and does business in the State of New York.

9. Rohm and Haas Company is incorporated in the State of Delaware and does business in the State of New York.

10. Stauffer Chemical Company is incorporated in the State of Delaware and does business in the State of New York.

11. Uniroyal, Inc. is incorporated in the State of New Jersey and does business in the State of New York.

12. Velsicol Corporation is incorporated in the State of Delaware and does business in the State of New York.

13. Zoecon Corporation is incorporated in the State of Delaware and does business in the State of New York.

14. Defendant United States Environmental Protection Agency (hereinafter "EPA") is a federal executive agency which is charged with the administration of FIFRA.

15. Defendant William D. Ruckelshaus is the Administrator of EPA. Defendants are hereinafter referred to collectively as "EPA."

STATUTORY PROVISIONS

16. This case arises under section 3(c)(1)(D) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D), as amended by the Federal Pesticide Act of 1978. This section provides, *inter alia*, that with respect to research data submitted to EPA on or after January 1, 1970, the Administrator may consider such data in support of an application by any other applicant within the fifteen-year period following the date the data were submitted, only if the applicant has made an offer to compensate the original data submitter. If the data submitter and applicant fail to agree upon the terms and amount of compensation, either party may initiate binding arbitration proceedings by the Federal Mediation and Conciliation Service, whose findings and determinations are final and conclusive. No official or court of the United States has power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator.

COUNT I

17. Since January 1, 1970, each plaintiff has submitted, and is continuing to submit to EPA, research data to support and maintain pesticide registrations. Since September 30, 1978, EPA has considered research data submitted by plaintiffs to support pesticide registrations of other companies.

18. Plaintiff Stauffer Chemical Company submitted to EPA research data in support of pesticide registrations for products containing the active ingredients butylate and EPTC, among others. Some of these data were submitted between January 1, 1970 and October 21, 1972; some were submitted between October 21, 1972 and September 30, 1978; and some were submitted after September 30, 1978. After September 30, 1978, EPA considered these data to support me-too pesticide registrations on behalf of other applicants, including PPG Industries Inc. and Drexel Chemical Company, for pesticides containing butylate and EPTC. These registrations would not have been issued if EPA had not used Stauffer's data. These data were used by EPA without Stauffer's consent.

19. Stauffer demanded an arbitration pursuant to section 3(c)(1)(D) of FIFRA to obtain compensation for the use of its data to support PPG's me-too registrations for butylate. A panel of three arbitrators made an award to Stauffer in this arbitration on June 28, 1983. *In the Matter of the Arbitration Between Stauffer Chemical Company and PPG Industries Inc.*, AAA Docket No. 16 199 077 82 FIFRA. The arbitrators found that EPA considered data submitted by Stauffer to support PPG's pesticide registrations for butylate. The arbitrators did not award Stauffer the amount of compensation it claimed.

20. Stauffer and the other plaintiffs are aggrieved by EPA's use of their research data to grant pesticide registrations to other applicants under section 3(c)(1)(D), because in order to obtain the compensation that FIFRA provides as a condition for EPA's use of their data, plaintiffs are compelled to resort to an arbitration procedure that violates their right to an adjudication that complies with Ar-

ticles I and III of the Constitution. Stauffer is aggrieved by the failure of the arbitrators in the butylate proceeding to award the amount of compensation Stauffer claimed.

21. The provisions for the determination of compensation of section 3(c)(1)(D) of FIFRA, as amended by the Federal Pesticide Act of 1978 (not including the provisions of § 3(c)(1)(D)(i)), are unconstitutional as a violation of Articles I and III of the Constitution.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

a. A Declaratory Judgment that the provisions for determination of compensation of section 3(c)(1)(D) of FIFRA, as amended by the Federal Pesticide Act of 1978 (not including the provisions of section 3(c)(1)(D)(i)), are unconstitutional as a violation of Articles I and III of the Constitution.

b. A Permanent Injunction enjoining defendant William D. Ruckelshaus, as Administrator of the United States Environmental Protection Agency, and his officers, agents, employees and representatives, from permitting or implementing any use of data where the submitter's compensation is to be determined under FIFRA § 3(c)(1)(D); provided, that notwithstanding the foregoing, any submitter may file a consent to the use of its data in support of a registration or amendment, in which case such registration or amendment shall not be subject to this injunction.

Respectfully submitted,

McKENNA, CONNER & CUNEO

BY _____

KENNETH W. WEINSTEIN
LAWRENCE S. EBNER
STANLEY W. LANDFAIR
DAVID I. BOOKSPAN

1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

ARTHUR, DRY & KALISH

BY _____

ALAN C. ZETTERBERG
1230 Avenue of the Americas
Rockefeller Center
New York, New York
(212) 489-2635
Attorneys for Plaintiffs

DATED: JULY 16, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CIV. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL. PLAINTIFFS,

against

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REENTRY OF JUDGMENT

MCKENNA, CONNER & CUNEO
KENNETH W. WEINSTEIN
LAWRENCE S. EBNER
STANLEY W. LANDFAIR
DAVID I. BOOKSPAN
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

ARTHUR, DRY & KALISH
ALAN C. ZETTERBERG
1250 Avenue of the Americas
New York, NY 10020
(212) 841-9300
Attorneys for Plaintiffs

DATED: JULY 16, 1984

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REENTRY OF JUDGMENT

This case is before the Court on remand from EPA's appeal to the Supreme Court. Without adjudicating the merits of the appeal, the Supreme Court vacated the judgment and remanded for further consideration in light of its decision in *Ruckelshaus* v. *Monsanto Co.*, 52 U.S.L.W. 4886 (June 26, 1984). Plaintiffs move that judgment be reentered because *Ruckelshaus* v. *Monsanto* has no effect on this case.

Preliminary Statement

This Court entered judgment on November 29, 1983, (1) declaring that the provisions for determination of compensation of section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) are unconstitutional as a violation of Article III, and (2) enjoining EPA from using data for which compensation is to be determined under FIFRA § 3(c)(1)(D).

In its opinion, the Court held that plaintiffs' challenge to section 3(c)(1)(D) is ripe. The Court rejected EPA's contention that the case would not be ripe until after an arbitration award had been rendered. It reasoned that plaintiffs were not challenging the result of any arbitration, but rather the statutory compulsion to resort to an unconstitutional arbitration to obtain compensation for the use of their data. The Court found that plaintiffs were injured by FIFRA's compulsion to use the unconstitutional arbitration scheme to vindicate their compensation rights, and that the constitutionality of the compensation-arbitration scheme "is clearly ripe for resolution." *Union Carbide Agricultural Products Co., Inc.* v. *Ruckelshaus*, 571 F. Supp. 117, 123n.2 (S.D.N.Y 1983).

On June 26, 1984, the Supreme Court issued its decision in *Ruckelshaus* v. *Monsanto Co.* The Court held that EPA's use of some of Monsanto's data under section 3(c)(1)(D) would constitute a taking of its property under the Fifth Amendment. Slip op. at 24-25.

The district court in *Monsanto* had concluded that the taking was unconstitutional because of the unavailability of

just compensation, and therefore it enjoined the taking. The district court found that the only mechanism for obtaining compensation for the taking was the FIFRA arbitration scheme; and that this did not fulfill the "just compensation" requirement of the Fifth Amendment because the arbitration scheme itself was unconstitutional under Article III. *Ruckelshaus* v. *Monsanto*, slip op. at 11, 28-29.

The Supreme Court reversed, holding that the FIFRA arbitration scheme was not the only remedy for a taking. It concluded that a suit for just compensation for a taking could be brought under the Tucker Act, and therefore that equitable relief to enjoin the taking was not proper. Slip op. at 30.

Because the Tucker Act was available to supply just compensation, the Court held that it was not ripe to decide whether FIFRA's arbitration scheme failed to provide just compensation due to its unconstitutionality. The Court stated:

> Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution.

Slip op. at 30-31. The Court stated that Monsanto's claims concerning the constitutionality of the arbitration scheme would not be ripe until EPA had considered its data in evaluating another application, and an arbitration award had been made. Slip op. at 31.

On July 2, 1984, the Supreme Court issued a summary order in EPA's appeal of this case. *Ruckelshaus* v. *Union Carbide Agricultural Products Co., Inc.*, 52 U.S.L.W. 3928. The order stated that "the judgment is vacated and the case is remanded to the United States District Court for the Southern District of New York for further consideration in light of *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. ___ (1984)." The Supreme Court's mandate will issue on July 27, 1984. Supreme Court Rule 52.

ARGUMENT

Judgment Should Be Reentered Forthwith

The Supreme Court's decision in *Monsanto* has no effect on this case. The Article III issue in *Monsanto* arose only as an element of Monsanto's claim of an uncompensated taking. The Supreme Court did not reach the Article III issue because it found that the taking could be compensated under the Tucker Act. In this case, the Article III claim stands alone as an independent ground for enjoining any use of data conditioned on arbitration. Because of this difference, plaintiffs' challenge to FIFRA's use-compensation scheme is fully ripe—as this Court already has found. The *Monsanto* case has no application. Therefore the original judgment should be reentered.

1. In *Monsanto*, the Supreme Court held that it was not ripe to determine whether constitutional defects in the FIFRA arbitration scheme preclude it from providing "just compensation" for a Fifth Amendment taking, because the Tucker Act is available to supply just compensation for any taking. Slip op. at 31. The *Monsanto* rationale does not apply here because this is not a taking case.

Plaintiffs here are not alleging a taking, or that FIFRA's arbitration scheme fails to supply just compensation for a taking. Rather, *this is an action to enjoin the use of data under FIFRA § 3(c)(1)(D), where such use is conditioned on statutory compensation that must be obtained through an unconstitutional arbitration scheme.* Unlike the situation in *Monsanto*, here the Tucker Act is irrelevant. The Tucker Act supplies just compensation in the event of a Fifth Amendment taking. It does not supply compensation for use of all data under FIFRA, or cure the Article III defects in the FIFRA arbitration mechanism.

2. This case is ripe because plaintiffs are aggrieved by FIFRA'S use-compensation system. *See Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978). Plaintiffs are aggrieved by the use of their data under FIFRA, because that use is conditioned on compensation that must be obtained by resort to an unconstitutional arbitration scheme.

After the preliminary injunction in this case was vacated in June 1981, data submitted by plaintiffs, which are subject to the use-compensation system of section 3(c)(1)(D), were considered by EPA in support of other companies' registrations. *See, e.g.*, Supplemental Affidavit of Andrew F. Fink of Stauffer Chemical Company, dated July 13, 1984, ¶¶2 & 3. And it cannot be disputed that EPA will, if not enjoined, again use plaintiffs' data in support of other companies' registration applications pursuant to section 3(c)(1)(D), further subjecting plaintiffs to the unconstitutional arbitration scheme.

Thus, plaintiffs are aggrieved by EPA's past and threatened future use of their data and by the compulsion to submit to unconstitutional arbitration. Plaintiff's "personal right ... to demand Article III adjudication" of their federal compensation claims is infringed. *See Pacemaker Diagnostic Clinic of America* v. *Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

Furthermore, the issues in this case are purely legal. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Plaintiffs do not challenge the result of any arbitration, nor does the adjudication of plaintiffs' claims depend in any manner on the outcome of an arbitration.

Nothing in *Monsanto* changes this Court's decision that plaintiffs' challenge to FIFRA's use-compensation system is ripe.

3. Even under the ripeness criteria applied to Monsanto's Taking Clause challenge—criteria which are not relevant here—this case is ripe. The Supreme Court stated that Monsanto's claim would become ripe "after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award ...." *Ruckelshaus* v. *Monsanto*, slip op. at 31.

It is undisputed that Stauffer Chemical Company's data were considered by EPA under FIFRA to grant me-too registrations for the pesticide butylate to PPG Industries. As a result of the use of Stauffer's data, an arbitration award was made to Stauffer on June 28, 1983. *See* Fink Supplemental Affidavit, ¶3. *In the Matter of the Arbitration Between Stauffer Chemical Co. and PPG Industries, Inc.*, AAA Docket No. 16 199 077 82 FIFRA. (A copy of the award is appended to the Fink Affidavit). Stauffer is aggrieved because its data were used to grant me-too registrations to a major competitor, PPG Industries, because it has been compelled to resort to an unconstitutional arbitration, and because it did not receive an award for the amount of compensation that it claimed.* Fink Supplemental Affidavit, ¶ 4.

In summary, even under *Monsanto's* Taking Clause ripeness criteria, the instant case is ripe because (1) EPA has considered Stauffer's data in approving PPG's butylate registrations; (2) an arbitration award has been rendered; and (3) Stauffer is aggrieved by the use of its data, by the compulsion to resort to the unconstitutional arbitration, and by the failure to obtain the compensation it claimed.

CONCLUSION

For the foregoing reasons plaintiffs request that the original judgment in this case by reentered.

McKenna, Conner & Cuneo
By _____
Kenneth W. Weinstein
Lawrence S. Ebner
Stanley W. Landfair
David I. Bookspan
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

*FIFRA § 3(c)(1)(D) precludes judicial review of Stuffer's award. In fact, Stauffer has received no money as a result of the award, and PPG Industries has filed suit to have the award invalidated as unconstitutional under Article III. PPG Industries, Inc. v. Stauffer Chemical Co., Civil Action No. 83-1941 (D.D.C. filed July 7, 1983).

ARTHUR, DRY & KALISH
By _____
ALAN C. ZETTERBERG
1250 Avenue of the Americas
New York, NY 10020
(212) 841-9300
Attorneys for Plaintiffs

DATED: JULY 16, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

ANNE M. BURFORD, AS ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
DEFENDANTS

AFFIDAVIT OF ANDREW F. FINK

AFFIDAVIT

Andrew F. Fink, being first duly sworn, affirms that the following statement is true and correct.

1. I am Managing Attorney for litigation for Stauffer Chemical Company ("Stauffer"). I am responsible for legal activities in connection with an arbitration proceeding under FIFRA currently in progress between Stauffer and PPG Industries, Inc ("PPG"), In the Matter of the Arbitration Between Stauffer Chemical Company and PPG Industries, Inc., AAA Dkt. No. 16 199 0077 82 FIFRA.

2. One of Stauffer's most important products is the pesticide butylate. Through extensive research Stauffer discovered butylate, determined the conditions under which it could be effectively used, and established its safety to humans and the environment. Stauffer submitted its research data on butylate to EPA to obtain pesticide registrations for butylate products.

3. In April, 1981 PPG applied to EPA to register butylate products virtually identical to Stauffer's. PPG did not submit research data to support the safety and efficacy of its product but instead, pursuant to FIFRA §3(c)(1)(D)(ii), sought a "me-too" registration based upon Stauffer's research data. As required by section 3(c)(1)(D)(ii), PPG offered to compensate Stauffer for its use of Stauffer's data. This offer was a general one that did not contain any dollar amounts.

4. EPA granted PPG's application for registration in July, 1981. After negotiations to determine compensation proved unsuccessful, Stauffer filed a demand for arbitration pursuant to §3(c)(1)(D)(ii) on April 20, 1982.

5. Stauffer requested the Federal Mediation and Conciliation Service ("FMCS") to appoint arbitrators to hear its case who had not been subjected to training and instruction by EPA on how to determine compensation. Stauffer's objection to the appointment of EPA-trained arbitrators was made because of Stauffer's belief that the EPA instruction advocated several legal interpretations of section 3(c)(1)(D)(ii) concerning the factors for determining compensation with which Stauffer disagreed and which, if

adopted by the arbitrators, would severely prejudice Stauffer's case. On May 25, 1982, FMCS denied Stauffer's request and required the appointment of EPA-trained arbitrators only. (See Exhibits 1 and 2 appended hereto.)

6. In the arbitration proceeding itself, the parties PPG and Stauffer differ categorically on issues of legal interpretation. Stauffer's claim is based on an interpretation of the statute and its legislative history that Stauffer is entitled to be compensated for the *value* received by PPG by being able to rely on Stauffer's research instead of performing its own; on this basis, Stauffer claims compensation of several tens of millions of dollars. PPG's legal position is that it owes Stauffer only a small share of the *cost* of a small portion of Stauffer's research on butylate; on this basis, PPG asserts that it owes Stauffer only a few tens of thousands of dollars. In support of its position, PPG has relied on legal interpretations that were propounded by EPA at the training sessions for FIFRA arbitrators—the training sessions treated by FMCS as a prerequisite to arbitrators' eligibility to sit on FIFRA arbitration panels.

/s/ _____
ANDREW F. FINK

State of Connecticut ss:
County of Fairfield

Subscribed and sworn to before me this ___ day of ___, 1983.

/s/ _____
Notary Public
My Commission Expires:

April 21, 1982

BY HAND

Mr. Wayne Horwitz
Director
Federal Mediation and Conciliation Service
2100 K Street, N.W.
Washington, D.C. 20427

Re: Arbitration Between Stauffer Chemical Company and PPG Industries, Inc. Under FIFRA Arbitration Rules

Dear Mr. Horwitz:

Stauffer Chemical Company yesterday filed with the American Arbitration Association a Demand for Arbitration of its butylate (pesticide) data compensation claim against PPG Industries, Inc. (copy of demand enclosed). To the best of Stauffer's knowledge, this is the first arbitration proceeding ever initiated under § 3(c)(1)(D)(ii) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), and the first of its kind ever administered by the Federal Mediation and Conciliation Service or the AAA.

Under the statute and implementing regulation (FIFRA § 3(c)(1)(D)(ii) and 29 C.F.R. § 1440.1 and Appendix), the FMCS is authorized to appoint an arbitrator. In its demand, Stauffe objects to the appointment as arbitrator in this proceeding of any person who attended the Pesticide Data Disputes Training Seminar conducted by the U.S. Environmental Protection Agency in October, 1980. As discussed in the Demand, mandatory training of an arbitrator on the key substantive issues to be adjudicated in subsequent statutory arbitration proceedings violates the rights of litigating parties to an impartial tribunal and to due process of law. Furthermore, the training was organized and conducted by EPA. That Agency has played a leading role in the formulation, administration and interpretation of FIFRA's data compensation provisions. Moreover, EPA was removed by Congress in 1978 from any further involvement in determination of compensation under the particular

statutory provisions addressed at the seminar and at issue in this proceeding. Stauffer, therefore, has requested the FMCS and the AAA to exclude seminar attendees from all consideration as arbitrator in this proceeding. As of this time, Stauffer does not know whether PPG concurs in or opposes the objection to appointment of the EPA-trained arbitrator.

Needless to say, the selection of an arbitrator in this first FIFRA arbitration will set an important precedent for future proceedings. To facilitate consideration of Stauffer's objection to appointment of an EPA-trained arbitrator, Stauffer hereby requests an opportunity to be heard orally before the FMCS. We await to hear from you in this regard.

Sincerely,
LAWRENCE S. EBNER
Attorney for Stauffer Chemical Co.

cc: Ms. Garylee Cox
Regional Director
American Arbitration Association

Mr. John F. Flanagan
Supervisor, Pesticide Registration
PPG Industries, Inc.

David R. Berz, Esquire
Wald, Harkrader & Ross

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, D.C. 20427

May 25, 1982

Mr. Lawrence S. Ebner, Esq.
McKenna, Conner & Cuneo
1575 Eye Street, N.W.
Washington, DC 20005

Mr. David R. Berz, Esq.
Wald, Harkrader & Ross
1300 19th Street, N.W.
Washington, DC 20036

RE: 16 199 0077 82 FIFRA, Stauffer Chemical Company and PPG Industries, Inc.

Dear Mr. Ebner and Mr. Berz:

This is the decision of the Federal Mediation and Conciliation Service (FMCS) on the issue of use in deciding FIFRA disputes of arbitrators who attended a training session held by the Environmental Protection Agency (EPA) and the American Arbitration Association (AAA).

I have carefully considered the voluminous correspondence and the arguments made at the meeting on May 12, 1982. I have also reviewed the materials used in the training seminar. My conclusions are as follows:

1. The arbitrators who attended the training session received entirely appropriate instruction and have not been unfairly biased.

2. The parties have not agreed to selection of an arbitrator pursuant to Section 7 of the FIFRA Arbitration Rules.

3. The arbitrators who attended the training session are best qualified to determine FIFRA disputes. It was the decision of FMCS prior to the training session to use the trained arbitrators as the initial cadre of FIFRA arbitrators. Therefore, by copy of this letter I am directing AAA to submit to the parties a list of names of arbitrators who attended the training session pursuant to Section 6 of the FIFRA Arbitration Rules.

Sincerely,

/S/ NANCY B. BROFF
General Counsel

cc: Garylee Cox
Mike Hoellering

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR
OF THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL., DEFENDANTS.

SUPPLEMENTAL AFFIDAVIT OF ANDREW F. FINK

1. I am the Managing Attorney for Litigation for Stauffer Chemical Company. This affidavit supplements my prior affidavit in this proceeding dated January 17, 1983, which is attached hereto as Exhibit 1.

2. Stauffer submitted to EPA, after January 1, 1970, substantial research data in support of pesticide registrations for products containing the active ingredients butylate and EPTC, as well as other active ingredients. Some of the data were submitted during the period January 1, 1970—October 21, 1972. Some of the data were submitted during the period October 21, 1972—September 30, 1978. Some of the data were submitted after September 30, 1978. After September 30, 1978, EPA considered the research data concerning these chemicals that had been submitted by Stauffer during each of these periods to support me-too pesticide registrations on behalf of other applicants, including PPG Industries, Inc. and Drexel Chemical Company, for pesticies containing butylate and EPTC. These data were used by EPA without Stauffer's consent.

3. Stauffer demanded an arbitration to obtain compensation for the use of its data to support PPG's me-too registrations for butylate. A panel of three arbitrators made an award to Stauffer in this arbitration on June 28, 1983. *In the Matter of the Arbitration Between Stauffer Chemical Company and PPG Industries, Inc.*, AAA Docket No. 16 199 077 82 FIFRA. A copy of the award is attached hereto as Exhibit 2. PPG has acknowledged, and the arbitrators

found that EPA relied on data submitted by Stauffer to support PPG's pesticide registrations for butylate. *See* Findings, 11, 14, 15, 18.

4. Stauffer is aggrieved by EPA's use of its research data to grant pesticide registrations to PPG and other applicants, because it does not have access to a forum that complies with Articles I and III of the Constitution in which to adjudicate the compensation that Stauffer is due under FIFRA. Stauffer is aggrieved by FIFRA's compulsion to resort to an unconstitutional adjudicatory arbitration procedure in order to obtain compensation for the use of its data in support of other companies' registrations. Stauffer is aggrieved by the failure of the arbitrators in the butylate proceeding to award the amount of compensation Stauffer claimed.

5. Stauffer will suffer irreparable harm if its data are used by EPA because it will be compelled to seek compensation under the FIFRA arbitration scheme, which the Court has held to be unconstitutional.

/S/
ANDREW F. FINK

Subscribed and sworn to before me
this 13th day of July, 1984

/s/
Notary Public
LYNNE T. WARGO
Notary Public
My Commission Expires March 31,
1987

BEFORE AN ARBITRATION TRIBUNAL
APPOINTED BY
THE FEDERAL MEDIATION AND CONCILIATION SERVICE

Docket No. PPG Industries, Inc.
16 199 077 82 FIFRA

IN THE MATTER OF ARBITRATION BETWEEN
STAUFFER CHEMICAL COMPANY, CLAIMANT,

and

PPG INDUSTRIES, INC., RESPONDENT

AWARD

This pesticide data dispute is before the Arbitration Tribunal for determination and award after hearings which spanned several months and generated a transcript of more than 2700 pages of testimony and legal argument. Numerous voluminous exhibits were received in evidence in the course of the hearings, most of which have been required to be treated as confidential by the parties and the tribunal under a protective order. Counsel for both parties have ably and exhaustively presented and briefed their respective cases and have provided the Arbitrators with a thorough foundation for their determination and award.

The Arbitrators now make the following findings, conclusions and award.

1. The Arbitrators are empowered and mandated to make an award in this pesticide data dispute by virtue of and in accordance with Sec. 3(c)(1)(D)(ii), which is only one of several data-sharing provisions of the Federal Insecticide, Fungicide and Rodenticide Act As Amended September 30, 1978 ("FIFRA"), 37 USC § 136 *et seq.*, and according to the FIFRA Arbitration Rules of the Federal Mediation and Conciliation Service, 29 CFR Part 1440. According to FIFRA, the findings and determination made by the Arbitrators are final and conclusive, with an opportunity for judicial review restricted only to instances of fraud,

misrepresentation, or misconduct by one of the parties or the arbitrators.[1]

2. An information copy of Judge Wangelin's Memorandum Opinion filed April 10, 1983 and Judgment filed April 12, 1983 in the United States District Court for the Eastern District of Missouri, Eastern Division, in the case of *Monsanto Company* v. *Acting Administrator, United States Environmental Protection Agency*, Civil Action No. 79-366C(1), was received by the Arbitrators from counsel for the parties several days before final argument was heard in this proceeding on April 28, 1983. In the *Monsanto* case, the Court adjudged and decreed that Sections 3(c)(1)(D), 3(c)(2)(A), 10(b) and 10(d) of FIFRA were unconstitutional and unlawful, beyond any power conferred on Congress by Article I, § 8, Clause 3 of the Constitution and in violation of the Fifth Amendment.[2]

3. In any event, counsel for both parties discussed the *Monsanto* decision in their final arguments and recognized it as being contrary to several prior decisions of the same constitutional question by U.S. District Courts in New Jersey, Pennsylvania, Delaware and the District of Columbia, and by the U.S. Court of Appeals for the Third Circuit; *certiorari* was denied by the United States Supreme Court in two separate instances. See the cases cited on the last page of Judge Wangelin's memorandum opinion. Neither counsel expressed any intention to rely on the *Monsanto* case or to

[1] "Misconduct" on the part of arbitrators can include their acting in excess of their powers or "perversely misconstruing the law." *Amicizia Societa Navigazione* v. *Chilean Nitrate Etc.*, 184 F. Supp. 116, affd. 274 F 2d 805.

[2] Parenthetically but interestingly, no court appears to have addressed the question whether other portions of the Constitution, notably Article 1, § 8, Clause *8* ("To promote the progress of . . . the useful arts," i.e., the so-called Patent Clause) and/or Clause *19* (The "Incidental Powers" Clause) of the Constitution have empowered Congress to enact the data-sharing provisions of FIFRA, even if, arguendo, Clause 3 did not. While we do not consider a determination of any such question necessary to our award, we are of the opinion that Article 1, § 8, Clauses 8 and 19 have empowered Congress to enact the Sec. 3(c)(1)(D)(ii) of FIFRA.

question the constitutionality of sec. 3(c)(1)(D)(ii) in this proceeding. On the contrary, both counsel have urged the Arbitrators to proceed with the determination and make an award in the instant case as expeditiously as possible. Thus, in our view, the parties have adopted Sec. 3(c)(1)(D)(ii) as a proper basis for this arbitral determination of their dispute concerning the compensation payable to the claimant under the FIFRA data-sharing provision.[3]

4. While FIFRA is a regulatory statute the primary concern of which is the protection of public health and safety, its purposes in providing for the sharing of data manifestly include the promotion of the development and commercialization of new pesticides as well as the avoidance of wasteful use of scientific manpower in duplicative testing and governmental review thereof. In return for the required sharing of an original submitter's data as part of the regulatory scheme, it provides for the award of compensation to the original data submitter.

5. Subsection (i) of Section 3(c)(1)(D), which was enacted to be only prospectively applicable to pesticides containing active ingredients initially registered after the enactment date of September 30, 1978, is not applicable to this proceeding because Stauffer's original FIFRA registration for "butylate," which is the particular pesticide involved in this dispute was granted in March, 1968. (Tr. 403).[4] In Subsection (i), Congress gave the original data submitter a 10-year period of absolute post-registration exclusivity with respect to the use of his submitted data, and the EPA is prohibited from using the original submitter's data in

[3] Counsel was well aware that such a constitutional question had been raised elsewhere. More than eight weeks prior to the date on which final arguments were heard in this case, counsel representing Stauffer here was attacking the validity of Sec. 3(c)(1)(D)(ii) in the United States District Court for the Southern District in New York in *Union Carbide et al* v. *Anne M. Burford, et al.*, 76 Civ. 2913 (RO).

[4] Stauffer's sales of butylate began in 1968 (Stauffer's Statement of Claim, p. 17) and Stauffer remained the sole distributor of butylate pesticide over a period of 15 years until PPG obtained registration for its butylate pesticide in 1983.

support of an application during this period without the original submitter's written permission.

6. Subsection (ii) of Section 3(c)(1)(D), which is the basis for this proceeding, was also enacted September 30, 1978 but made to apply retroactively to pesticide data originally submitted by an applicant after December 31, 1969 in support of a registration granted before the date of enactment. According to this subsection, the EPA is not allowed to consider the original submitter's data in support of an application of another within 15 years from their original submission unless the other appliant offers to compensate the original submitter for the use of such data. If, as in this case, the parties cannot agree on a proper amount of compensation, the statute provides that such compensation shall be determined by binding arbitration.

7. Under FIFRA, in an effort to conserve resources of the Government and of industry, Congress has chosen to encourage and enable EPA to adopt a generic approach to registration of pesticides, i.e., to focus on the active chemicals themselves, in preference to having to spend its resources on individual registrations of end-use formulations. Sec. 3(c)(1)(D)(ii) allows the test data originally submitted by one manufacturer in support of its application for a pre-1978 registration of a particular pesticidal chemical to be used by the EPA in considering the application of a follow-on manufacturer or formulator seeking a similar registration of the same chemical. However, in the case of data originally submitted after December 31, 1969, and to be used by the EPA within 15 years after their original submission, such use is permitted only on condition that the follow-on registrant offers to compensate the original data submitter for any such use of such data. To generate such data the initial applicant typically must conduct chronic animal feeding tests, environmental chemistry tests, fish and wildlife tests and so forth. Such tests are not only notoriously expensive but also time consuming, and typically require a span of four to five years for completion. By allowing the originally submitted data to be considered by the EPA in support of subsequent applications of other manufacturers seeking registration for the same product

within 15 years from the date of their original submission (the data may be used freely after 15 years), the law encourages the avoidance of wasteful duplication of testing and of the concomitant waste not only of industry's scientific manpower, laboratory animals and other resources but also EPA staff time and resources. As a result, highly skilled personnel as well as other valuable resources can be put to more productive uses. In doing so, the law directly encourages competition and lower pesticide costs to the public, while at the same time it has been designed to encourage research and innovation in the pesticide field by requiring follow-on registrants to pay fair compensation to the original data submitter for the use of his data.

8. The original innovator and test data submitter is expected to have had adequate opportunity to be compensated for his ingenuity, efforts and risk taking in having had a protected head start in marketing his product. Such head start is protected not only by the stated recognition given by FIFRA to his proprietary rights in his test data but usually also by a patent for his novel product and/or its manner of use. After 15 years from an original test data submission, consideration thereof by the EPA in support of an application of another person therefore does not entitle the original submitter to compensation under Sec. 3(c)(1)(D)(ii).

9. Any such compulsory data sharing extends in any event only to test data relevant to public health and safety, e.g. toxicity in use, and not to information concerning the submitter's proprietary manufacturing processes or analytical procedures or the like, all of which remains entitled to protection as a trade secret.

10. The original innovator and data submitter-registrant will in the normal scheme of things spend much effort, time, and expense in inventing a new pesticide, in developing it, in obtaining regulatory approval for it and in promoting and marketing it. Moreover, the burden of regulatory requirements may be substantially greater in the case of the original innovator-registrant than in the case of a subsequent registrant coming along a decade or more after a particular chemical pesticide has proved itself and become accepted in the economy as being safe and effective. In fact, efficacy data were required as a condition for approval of Stauffer's original registration of butylate in this case whereas such efficacy data were waived by the EPA as a matter of general public policy by the time PPG applied for its registration more than a decade later. While in such a case the original submitter may have been, and he was in this case, required to obtain and submit expensive field test data whereas the follow-on registrant was not, the latter clearly is not responsible for any such discrepancy and should not be required to compensate the original submitter for data that are no longer required by the EPA for approval.[5]

11. Stauffer Chemical Co. ("Stauffer"), the claimant, is the originator of "butylate", the novel agricultural herbicide that is involved in this case.[6] Stauffer obtained its first registration for butylate from the U.S. Department of Agriculture[7] in 1968 on an application that was filed in 1966 and was supported by extensive safety and efficacy test data that Stauffer had generated in accordance with the then existing regulatory requirements.

12. In 1978, after enactment of section 3(c)(1)(D)(ii) and some two years after expiration of Stauffer's patent protection, PPG Industries, Inc. ("PPG"), the respondent herein, applied to EPA to have butylate of its own manufacture registered so that PPG could also lawfully make and sell it as a corn herbicide in the United States in competition with Stauffer. In support of its application for registration, PPG relied on the data originally submitted by Stauffer and submitted to Stauffer an offer to compensate the latter for the

[5] After all, if there had been no follow-on registrant at all, the original data submitter would have had to incur the same testing costs regardless and yet not be compensated for any such data except by way of the commercial success that its approved pesticide achieves.

[6] Stauffer obtained its basic United States patent for butylate in 1959. Stauffer's patent protection for butylate accordingly expired in 1976.

[7] USDA was in charge of federal regulation of pesticides before the establishment of the U.S. Environmental Protection Agency ("EPA").

EPA's consideration of Stauffer's data in PPG's application, all in compliance with Sec. 3(c)(1)(D)(ii).

13. The parties made some effort to negotiate compensation, but such efforts soon were abandoned in view of the diametrically extreme positions adopted and rigidly adhered to by the parties. Thereupon, Stauffer initiated this arbitration proceeding in accordance with Sec. 3(c)(1)(D)(ii).

14. PPG, having applied for registration of its butylate herbicide on the basis of test data previously generated by Stauffer, PPG has clearly avoided the expense of having to generate such data independently. In addition, according to substantial evidence produced in this case, PPG has saved some five years of time that it would otherwise have had to spend in generating the required test data on its own and obtaining independent regulatory approval on their basis. Consequently, we find that by invoking the data-sharing provision of Sec. 3(c)(1)(D)(ii), PPG has saved very substantial and identifiable testing costs that Stauffer had previously incurred in generating the test data required in support of its registration, and for which Stauffer is entitled to receive specific compensation. In addition, PPG has also as a result obtained an important economic benefit in being able to start marketing its butylate some five years earlier than it could have without reliance on Stauffer's data. By contrast, Stauffer incurred a corresponding opportunity cost or loss of profits when it had to delay its marketing of butylate until it obtained the required test data and the various label approvals for its butylate herbicide and for its many specific uses and application methods. For this cost avoidance or benefit of early market entry PPG likewise owes Stauffer compensation. However, as we believe that attributing any definite sum to the cost would necessarily have to be based on considerable speculation, we conclude that compensation for this can best and most

reasonably be expressed as a fraction of the sales actually made and to be made by PPG over the next several years.[8]

15. Stauffer could have copyrighted some or all of its labels, but for whatever reason chose not to copyright any. Had the labels been copyrighted, their slavish copying by PPG clearly would have been an infringement of Stauffer's rights under the copyright laws. In the absence of valid copyright protection for Stauffer's labels, their literary text as such is in the public domain for anyone to copy. However, the incorporation of their substance in PPG's own approved labels presupposes EPA's use of the underlying Stauffer data in their approval and entitles Stauffer to compensation for such use within the limits of Sec. 3(c)(1)(D)(ii).

16. To put it differently, where the follow-on registrant deliberately chooses to copy and adopt as his own the substance of an original registrant's approved label[9], the follow-on registrant clearly benefits from the relevant data generated and submitted by the first registrant. In such a case, the follow-on registrant should be required to pay suitable compensation to the original submitter to the extent that the EPA would be expected to consider the original submitter's data as support for the follow-on registration, i.e., for any claim on any label covered by such registration. Whether or not the relevant test data are re-

[8] We decline to award any amount for the so-called "market momentum" factor claimed by Stauffer. Extensive testimony by Stauffer's witnesses sought to project PPG's "market momentum" benefit and hence the value of the Stauffer data used in the process. However, we have found these projections altogether too speculative as a basis for a monetary reward because, inter alia, PPG may not market butylate throughout the projected years for any number of reasons including, for instance, the possibility that a new and superior or more profitable corn herbicide may displace butylate to some extent or even totally.

[9] The term "label", as used in pesticide regulation, includes not only the label proper that is affixed to a container for the pesticide and that customarily discloses its name, composition and some directions for its use, but also includes technical information bulletins and other information made available to purchasers and containing detailed claims as well as directions for use of the product.

quired for label approval under currently prevailing regulations, the EPA should not be expected to approve any new label of a follow-on registrant, and could in proper cases be expected to initiate a cancellation action, if a label claim is significantly inconsistent with any test data previously submitted by another registrant. To this extent then Stauffer's test data would of necessity have had to be at least implicitly considered by the EPA in approving PPG's labels, irrespective of whether such test data were actually required by current regulations. Clearly, in any such case where the follow-on registrant has extensively copied an approved label including claims and instructions generated by a prior registrant, he has economically benefited from the data generated and paid for by the prior registrant and should compensate him for its use. However, when the particular test data are not affirmatively required for approval according to current regulations, economic value of such data to the follow-on registrant is essentially a prospective benefit that cannot be properly measured except in terms of product sales actually made in the future. For this reason, we conclude that Stauffer as the original submitter of such data can most fittingly be compensated for the value of this kind of data not by a lump sum reimbursement of a share of their known original cost or by a lump sum corresponding to an estimate of their eventual economic value, but by a running compensation proportional to the follow-on registrant's actual sales of product.

17. EPA had taken the position that the so-called "citeall" provision with an attendant offer of compensation, as specified in Sec. 3 (c)(1)(D)(ii), was compulsory on all follow on registrants seeking their own registration for a pesticide previously registered by another manufacturer. However, in *National Agricultural Association, Inc. et al* v. *U.S. Environmental Protection Agency*, CA79-2063 (U.S.D.C., D.C., Jan. 20, 1983), the Court has established that a follow-on registrant cannot be compelled against his will to proceed on the basis of the "citeall" data sharing provision. On the contrary, the follow-on registrant was recognized as having the right to elect to apply for and obtain registration on the basis of independently generated test

data of its own as long as such independently generated data meet the then applicable law and regulations. Hence, on one hand, it follows that to achieve the conservation of resources and the promotion of pesticide research and development that Congress intended in enacting FIFRA, the compensation to the original data submitter under Sec. 3(c)(1)(D)(ii) should be no greater than the total costs (including time delay) that the follow-on registrant would have to incur if it elected to base its application on its own tests rather than on reliance of the original submitter's data. On the other hand, however, the compensation should fairly take into account the costs the original data submitter incurred in generating the required test data as well as the benefits obtained by the follow-on registrant in relying on the first registrant's data in support of the follow-on registrant's registration.

18. In the circumstances of this case, we find that the compensation to Stauffer called for by Sec. 3 (c)(1)(D)(ii) for PPG's use of Stauffer's data should reflect a fair share of both the cost of testing required by current regulations and of the "opportunity costs" that PPG avoided not only by avoiding the normal regulatory delay but also by its comprehensive copying of Stauffer's approved labels.

19. In determining proper compensation, one has to consider not only the cost in money and time incurred by Stauffer and avoided by PPG in obtaining the test data submitted to EPA in support of the butylate label approvals that each of the two parties eventually obtained, but also the loss of profit suffered by Stauffer due to regulatory delays and the avoidance of a similar loss by PPG. Though these factors were separately presented by Stauffer, they are interrelated. They are interrelated in that the end product of obtaining all the data required to support all the various label claims and of EPA's consideration of such data and claims, though stretching over a considerable period of time, is the aggregate of all the various approved labels that Stauffer originally obtained and PPG later copied. The record reveals that PPG ultimately appropriated and copied, virtually verbatim, Stauffer's labels for butylate including all uses and all methods of applications to crops de-

veloped by Stauffer. While PPG had the right to do this in view of its offer to compensate Stauffer and in the absence of copyright protection for such labels, having done so and having obtained the economic benefit of Stauffer's labels and the extensive data submitted to support the same, we conclude that PPG cannot be heard to say that no such data are "compensable." On the contrary, we find it fair and proper, and consistent with the language and spirit of Sec. 3(c)(1)(D)(ii), to base an award to Stauffer and against PPG which includes a factor for such opportunity costs.

20. Based on the evidence received, including especially but not limited to Stauffer Exhibits 33 and 36 and related PPG Exhibit 10, as well as Stauffer Exhibit 92 and related PPG Exhibits 21 and 22, and testimony relevant to these, we find the direct aggregate testing cost of required pre-registration data submitted by Stauffer for which it is entitled to receive compensation from PPG under Sec. 3(c)(1)(D)(ii) to be $2,930,000 (in 1983 dollars). In computing this figure, we have excluded the cost of test data submitted before 1970 and not cited later, as well as data from numerous tests that we have found to be substantially duplicative of other submitted data and therefore not required in support of PPG's registration. On the other hand, we have included in our computation pre-1970 test data that were resubmitted after 1969 and were not substantially duplicative of other data submitted.

21. In view of the above, we have determined the sum of $1,465,000 (one half of the sum of $2,930,000 shown in Paragraph 20 above) to represent a fair share of the cost of testing to be paid by PPG to Stauffer for the use of Stauffer's test data in support of PPG's registration.

22. Further, for the opportunity costs avoided by PPG, we hold that Stauffer is entited to receive additional compensation from PPG based on the volume of PPG's eventual sales of butylate. For the purposes of computing and determining this element of compensation, we have accepted the projected total butylate sales figures for the years 1983-1987 as given in Stauffer Exhibit 79, Table 3. Differing to some extent, however, from the PPG market share figures assumed in Table 3, we have assumed that

PPG's market share will be 5% in 1983, 10% in 1984 and 15% not only in 1985 but also in 1986 and 1987. Based on this, we have calculated that PPG's butylate sales in these five years should aggregate approximately 47,250,000 pounds and, based on other data shown in said Table 3, PPG's aggregate profits from these sales should approximate $28,250,000, i.e., about 60 cents per pound, over this five-year period. If PPG's actual sales volume is greater or smaller than projected, its profits should be correspondingly greater or smaller, and its compensation payments to Stauffer should reflect these variations. In any event, we hold Stauffer entitled to receive a share of such PPG profits as part of its compensation.

23. While the figures in Table 3 of Stauffer's Exhibit 79 have lead us to conclude that PPG's profits from its butylate sales should aggregate about $28,250,000 and average about 60 cents per pound in the years 1983 through 1987, this projection is necessarily speculative and its validity may in reality be greatly affected by PPG's future successess and failures in the marketplace. In addition to the speculative nature of the projections for PPG's share of the butylate market, the size of the total butylate market itself may fluctuate considerably over the years due to largely unpredictable factors such as the world market for corn in general, the recently initiated payment-in-kind (PIK) program in particular, the possible advent of a new and better or more cost-effective herbicide, new regulations concerning the use of butylate or alternative herbicides, etc. Such fluctuations could have a potentially large positive or negative effect on PPG's profits and hence on the compensation we consider fairly payable to Stauffer as part of this award. To minimize the effect of such fluctuations, we have determined that in these circumstances a ten-year period is likely to provide a more just and proper basis than a five-year period for the payout of reasonable running compensation based on PPG's actual future sales, provided that the compensation rate is suitably set.

THE COMPENSATION AWARDED

In view of the above, Stauffer is hereby unanimously awarded and held entitled to receive from PPG:

A. A lump sum in the amount of *$1,465,000* (One-Million-Four Hundred and Sixty-Five-Thousand Dollars), which sum PPG shall pay to the American Arbitration Association, for Stauffer's account within 30 (thirty) days from the date when this award or a true copy thereof is mailed by the American Arbitration Association to PPG's attorneys at their address of record; *plus*

B. Running compensation (R) for every pound of butylate manufactured or otherwise acquired by PPG in the United States in the ten calendar years from 1983 through 1992, both inclusive, and not discarded but sold or otherwise transferred by PPG for use by third parties, which R shall be computed according to the formula

$$R = \$0.15/\text{lb.} \times \frac{Y}{I}$$

Wherein Y is the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics for the month of November preceding the year in which the respective sale or other transfer is made, and wherein I is such Producer Price Index published for November 1982, *with the proviso*, however, that the total number of pounds of butylate on which this compensation R is due in any year after 1987 shall in no event exceed the highest total number of pounds of butylate on which such compensation was due in any of the calendar years 1983 through 1987, both inclusive. PPG shall report in writing to Stauffer concerning all such butylate sales and transfers within thirty (30) days after the end of each calendar quarter falling within the calendar years 1983 through 1992 and enclose with each such report the compensation due, except that the first such report and payment shall only be due on September 1, 1983 and shall cover sales and transfers of butylate made by PPG between December 31, 1982 and July 1, 1983. No compensation shall be due for any butylate acquired by PPG directly or indirectly from Stauffer.

COSTS

(i) The expenses of witnesses for either party shall be paid by the party producing such witnesses.

(ii) The cost of the stenographic record and all transcripts thereof shall be prorated equally between the parties and shall be paid for by the responsible parties directly to the reporting agency, unless the parties have agreed otherwise.

(iii) All proper other expenses of the arbitration, including but not limited to the administrative fee of the AAA, the arbitrators' agreed fees, the costs of providing a hearing room, and required traveling and other expenses of the arbitrators and of AAA representatives, shall be borne equally by the parties and promptly settled. The AAA may temporarily withhold from Stauffer, subject to a suitable later pro-rata reimbursement from PPG, a portion of the award made under (A) above, and use it for promptly settling all such expenses which are proper, including all fees and expenses billed to the AAA in this case within sixty (60) days from the date when this award is officially mailed to the parties.

Respectfully,

/s/
TERRELL C. BIRCH, *Arbitrator*

/s/
PETER H. SMOLKA, *Arbitrator*

/s/
JOHN C. VASSIL, *Arbitrator*

Date: June 28, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

AFFIDAVIT OF CHARLES O. O'BRIEN

CHARLES O. O'BRIEN, being first duly sworn, deposes and says:

1. I am President, Ciba-Geigy Agricultural Division. I have held this position since 1970. As President, I have total business responsibility for the Agricultural Division which includes administration, marketing, production and research and development.

* * *

7. Prior to 1970 Ciba-Geigy submitted research data necessary to obtain pesticide registrations to the U.S. Department of Agriculture ("USDA"). Portions of these data were regarded by Ciba-Geigy as trade secrets under the applicable state law.

* * *

15. All trade secret research data submitted to EPA after December 1970 and prior to October 21, 1972, were similarly submitted with the expectation and belief that their trade secret status would be protected by the agency, as custodian of the data.

* * *

18. After October 21, 1972, Ciba-Geigy continued to submit research materials to EPA in support of applications for the registration of pesticide chemicals. Ciba-Geigy submitted such materials in reliance upon the trade secrecy law, which continued to be recognized and applied by the federal government, with the expectation that research data submitted by Ciba-Geigy which were trade secrets would not be publicly disclosed by EPA or used by the agency to support registration applications by competitors of Ciba-Geigy.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC. ET AL., PLAINTIFFS,

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL., DEFENDANTS.

AFFIDAVIT OF DONALD E. ROSEN

DONALD E. ROSEN, being first duly sworn, deposes and says that:

1. He has been employed by plaintiff E. I. du Pont de Nemours and Company (hereinafter "Du Pont") since 1947 and since 1955 has been assigned to work dealing with the government registration of pesticides to be sold by Du Pont.

2. In December 1979, in his capacity as an employee of Du Pont, he compiled an "INDEX OF TRADE SECRET DATA SUBMITTED TO EPA (Through September 30, 1978)" with respect to each of the primary pesticide active ingredients which were included in products then sold by Du Pont and one copy of each such Index is attached hereto.

3. To his knowledge and belief each of the attached Indexes represents an accurate reference to data considered to be trade secrets of Du Pont which had been submitted to the United States Environmental Protection Agency (or its predecessor) on or before September 30, 1978 with respect to each specified pesticide ingredient.

/S/ _____
DONALD E. ROSEN

Subscribed and sworn to before me this 11th day of May, 1981.

/S/ _____
OLIVIA J. NICKLE
Notary Public

My Commission Expires: Nov. 14, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)
AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS.

JOHN E. DAVIES, being first duly sworn, deposes and says:

1. My name is Mr. John E. Davies and I am Vice President and General Manager, Agrochemical Division of Rhone-Poulenc Chemical Company ("Rhone-Poulenc"). In my capacity as General Manager, I am responsible for all activities of the Agrochemical Division of Rhone-Poulenc in the United States. My responsibilities include overseeing the research and development, manufacturing, marketing and sales departments of the Agrochemical Division.

* * *

11. Trade secret research data and information have been routinely submitted to the EPA and its predecessors the Food and Drug Administration ("FDA") and the United States Department of Agriculture ("USDA") since 1947 for the purpose of supporting product registrations and petitions for tolerances under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). These data have been submitted with non-trade secret data in integrated packages because segregating the information would take considerable time and effort.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)
AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

AFFIDAVIT OF DONALD S. MacIVER

DONALD S. MACIVER, being first duly sworn, deposes and says:

1. I am Vice President and Assistant General Manager of the Agricultural Chemical Division of Stauffer Chemical Company, a position I have held since 1978.

* * *

8. Since approximately 1955, Stauffer has submitted and continues to submit the results of its pesticide research to the federal agencies to support the registration of pesticide chemicals under the Federal Insecticide, Fungicide and Rodenticide Act and to obtain residue tolerances under the Federal Food, Drug and Cosmetic Act.

9. Stauffer is the primary developer of research data on the 17 pesticide active ingredients listed in APPENDIX 1. To support pesticide registrations and to obtain tolerances for products containing these active ingredients, Stauffer has submitted to the government the following types of trade secret research data:

(a) *General Chemistry Data*—Data concerning the composition of the technical grade chemical which functions as the active ingredient of a pesticide product and data concerning the composition of the formulated product. These data specifically include:

— analytical methods for the active ingredient and impurities;

— assays of the technical-grade chemical and impurities;

— analyses of the technical-grade chemical, including the active ingredient and impurities;

— description of manufacturing processes for the technical-grade chemical;

— chronic/oncogenic studies (18 to 30 months of dosing) in two rodent species;

— multiple generation reproduction studies in rodents;

— teratogenicity studies in one or more mammalian species.

(e) *Efficacy and Phytotoxicity Data*—Detailed data on the use of pesticides on the target pest and target crop as follows:

— filed test results using various rates, application methods, formulation tank mixes, etc. to establish the most beneficial use parameters from both a pest control and crop tolerance viewpoint;

— comparative studies with other commercial development candidates.

* * *

13. Trade secret properties were protected by USDA in its policy and practice. It was Stauffer's understanding that these trade secret protections prevented USDA, as custodian of the data, from disclosing trade secret research data without express authorization from Stauffer. After December 1970 and prior to October 21, 1972, all trade secret research data submitted to EPA were similarly submitted with the expectation and belief that their trade secret status would be protected by the Agency, as custodian of the data.

14. On October 21, 1972, amendments to FIFRA became effective. My understanding of the law as amended was that our state law trade secrecy rights were not changed by the amendments and were provided continued protection. Under the amendments, research data which constituted trade secrets could not be disclosed by EPA without Stauffer's authorization.

15. After October 21, 1972, Stauffer continued to believe and expect that all trade secret research materials submitted to EPA and the Department of Agriculture prior to October 21, 1972, would be maintained as trade secrets by

EPA and not be publicly released or relied upon by EPA to support the pesticide registration application of a competitor of Stauffer.

16. After October 21, 1972, Stauffer relying upon its belief and expectation that trade secret research data submitted by Stauffer to the government would not be publicly disclosed by EPA or used for the benefit of its competitors, continued to submit research materials to EPA in support of applications for the registration of pesticide chemicals.

17. Relying upon the trade secret status of its submissions to the USDA and the EPA, Stauffer furnished these agencies with more information than the minimum necessary to obtain or maintain its registrations. For example, when conducting field tests a researcher would ordinarily test and report on a large number of different chemical compounds and different dose rates. Although only a small portion of the report would pertain to the registration in question, the entire report would be submitted to the USDA, and later the EPA, in reliance upon the agency's protection of trade secret information. Similarly, as a general practice, Stauffer would conduct more research than required by the federal agency to obtain a registration. In the interest of full disclosure and in reliance upon the agency's protection of trade secret information Stauffer would submit the additional information to the agency.

18. Stauffer submitted data to the government freely with the expectation that USDA and EPA would protect the trade secret status of Stauffer's data. Stauffer would not have submitted all of these data to the government if trade secret protection had not been available.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)
AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS.

ROBERT C. BROWN, being first duly sworn, deposes and says:

1. My name is Robert C. Brown and I am Group Patent Counsel for Union Carbide Corporation. I am responsible for the patent activities of Union Carbide's Polyolefins Division and its wholly owned subsidiary company Union Carbide Agricultural Products Company, Inc. ("Union Carbide"). Since 1969, I have been responsible for all patent matters at Union Carbide relating to agricultural chemicals including prosecution of applications, licensing matters and litigation.

* * *

I. Types of Trade Secret Data

3. Since the enactment of FIFRA in 1947, Union Carbide has submitted research data to the federal government to support tolerance petitions and applications for the registration of various pesticide products. The general types of research data required by the Environmental Protection Agency ("EPA") and its predecessors have included the following: general chemistry data, efficacy data, human hazard and environmental safety data, metabolism data, environmental chemistry data and manufacturing and process formulation data.

4. Portions of the data submitted to the EPA by Union Carbide under FIFRA are considered company trade secrets if they fit the following criteria: (1) the data were developed or acquired by Union Carbide, (2) the data have not been published or made available to persons outside

Union Carbide and (3) the data bestow a competitive advantage to Union Carbide. The following description of the general types of data Union Carbide has submitted to EPA and its predecessors since 1947 identifies the portions of the data considered trade secret by Union Carbide and the portions that are not regarded as trade secret. I have not included a description of general chemistry data, which are protected as trade secret under the 1978 amendments to FIFRA and are not at issue in this lawsuit.

* * *

Supreme Court of the United States

No. 84-497

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

November 26, 1984

Justice O'Connor took no part in the consideration or decision of this case.

Office-Supreme Court, U.S.
FILED
JAN 11 1985
ALEXANDER L. STEVAS,
CLERK

(5)

No. 84-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District of New York

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BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

THOMAS H. TRUITT*
DAVID R. BERZ
JEFFREY F. LISS
PAUL E. GUTERMANN
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for PPG Industries, Inc.

**Counsel of Record*

January 10, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-497

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District of New York

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BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

PPG Industries, Inc. ("PPG") submits this brief *amicus curiae*, having obtained written consent from both parties. PPG maintains that unless *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984) is overruled, this case is not ripe. Moreover, PPG's challenge to an arbitration award, pending in the United States District Court for the District of Columbia since July 7, 1983, is the forum in which the constitutional issues should be decided. Should the Court reach the substantive issues, however, it is PPG's position that, properly interpreted, the compulsory arbitration provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii) (1983), is constitutional.

INTEREST AND POSITION OF THE AMICUS

PPG is the unnamed party to this case. Appellees argue that the constitutional questions decided in the court below are ripe because appellee Stauffer Chemical Company ("Stauffer") has participated in a mandatory arbitration proceeding, as required by *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2882 (1984). Motion to Affirm at 14, *Ruckelshaus v. Union Carbide Agricultural Products Co.*, No. 84-497 (U.S. filed Sept. 6, 1984).[1] PPG was the other participant in that arbitration, which produced the first and only arbitration award under FIFRA. PPG has challenged the validity of the award rendered in that proceeding in United States District Court, for the reasons discussed below. In these circumstances, PPG brings to this case a perspective not offered either by the appellees or the Government.

PPG manufactures and sells the pesticide product known generically as butylate, pursuant to a valid registration obtained from the Environmental Protection Agency ("EPA" or "the Agency"). Butylate was developed, patented, and originally registered under FIFRA by appellee Stauffer. In 1981, five years after Stauffer's butylate patents had expired, PPG applied for and obtained registration from EPA. Under EPA regulations in effect at that time, PPG was required to rely on test data previously submitted by Stauffer and to offer to compensate Stauffer. The parties were unable to agree on an amount of compensation and soon thereafter Stauffer unilaterally initiated mandatory arbitration.

[1] References to the Motion to Affirm are hereinafter cited as "M.A." References to the Government's Jurisdictional Statement are cited as "J.S."

On June 28, 1983, a panel of three arbitrators awarded Stauffer an amount of compensation at least six times greater than the cost of the data relied upon.[2] On July 7, 1983, PPG filed an action in the United States District Court for the District of Columbia challenging the award on the grounds that FIFRA is unconstitutional, unless interpreted to provide a standard of compensation and judicial review adequate to ensure that FIFRA arbitrators abide by that standard. *PPG Industries, Inc. v. Stauffer Chemical Co.*, No. 83-1941 (D.D.C. filed July 7, 1983). Stauffer counterclaimed for enforcement of the award and alternatively cross-claimed against EPA for a declaration that FIFRA violates Article III, and counterclaimed against PPG for damages from its use of Stauffer's data.

SUMMARY OF ARGUMENT

This case is not ripe because the court below disregarded the requirements of *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), and addressed the constitutional challenge to the FIFRA compensation system in the abstract, rather than on review of an actual arbitration. Appellees would have the Court overrule *Monsanto* and consider the Article III questions. The size and complexity of the record compiled in the PPG/Stauffer arbitration,

[2] The arbitrators awarded compensation to Stauffer of a lump sum constituting fifty percent of Stauffer's test costs, plus a post-patent running royalty of fifteen cents on every pound of butylate sold by PPG from 1983 through 1992 (subject to certain adjustments). The arbitrators awarded the royalty to compensate Stauffer for the "value" received by PPG from its reliance on Stauffer's data. The effect of the running royalty is to inflate the compensation award from approximately $1.4 million (fifty percent of Stauffer's data costs, as calculated by the arbitrators) to almost $17 million, to be paid over a ten-year period.

however, confirm this Court's judgment in *Monsanto* that challenge to the arbitration system should be considered in the context of an actual arbitration, so as to foster the presentation of concrete constitutional issues.

Should the Court reach the constitutional issues, PPG demonstrates that when properly interpreted, FIFRA's compulsory arbitration system is constitutional. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court recognized a narrow exception to the constitutional requirement that the federal judicial function be performed only by Article III courts. That exception permits non-Article III decision-makers, such as administrative agencies, masters, and arbitrators, to adjudicate federally created rights, but only if their fact-finding authority is limited by clearly defined congressional standards and their conclusions of law are subject to adequate judicial review. We submit that FIFRA's compulsory arbitration provision satisfies those standards.

When interpreted in light of its congressional purposes, the compulsory arbitration provision in FIFRA defines a narrow, fact-finding role for arbitrators to resolve compensation disputes. Congress limited FIFRA arbitrators' authority to the determination of the direct costs incurred by the original registrant in developing the test data relied upon by the subsequent registrant, and the apportionment of those costs fairly, equitably, and reasonably. Arbitrators who go beyond this limited statutory function run afoul of the substantive standard established by the Act.

Congress designed the follow-on registration procedures in Section 3(c)(1)(D) of FIFRA to avoid wasteful, duplicative testing by industry and review of such tests

by EPA, to reduce the costs of and minimize delays in registration, and to enhance competition in the pesticide industry. Congress did not intend the statute to provide economic windfalls to original registrants, create barriers to market entry, or extend the duration of patent grants. Accordingly, FIFRA compensation awards must be limited to a fair share of the costs incurred by the initial pesticide registrant in developing the relevant test data required by EPA. FIFRA does not contemplate or authorize a wide-open limitless inquiry into other factors, such as the economic "value" or "benefit" to a follow-on registrant in relying on the data filed by the original registrant.

The judicial review provision in Section 3(c)(1)(D)(ii) authorizes federal district courts to determine whether FIFRA arbitrators abide by the congressionally mandated standard of compensation. Arbitrators who exceed their authority by basing awards on factors not permitted by the Act have committed "misconduct" within the meaning of FIFRA. Accordingly, FIFRA's judicial review provision satisfies the constitutional requirements enunciated in *Northern Pipeline, supra.*

ARGUMENT

I. THIS CASE IS NOT RIPE.

In *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2882 (1984), this Court refused to hear Monsanto's Article III challenge to FIFRA's compulsory arbitration system because it was not ripe: "Only after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." The Court then

remanded *this* case for reconsideration in light of *Monsanto. Ruckelshaus v. Union Carbide Agricultural Products Co.*, 104 S. Ct. 3566 (1984).

Appellees in this case argue that, because one of their number—Stauffer—has been through an arbitration, the *Monsanto* ripeness test has been met, even though this case was filed well before Stauffer initiated arbitration and does not arise out of an appeal of that arbitration.[3] Yet the clear import of the Court's ruling in *Monsanto* is that the constitutional challenge must arise in the context of an actual arbitration. Indeed, at the time this Court decided *Monsanto*, it was made aware Stauffer had participated in an arbitration, Brief for PPG Industries, Inc. as Amicus Curiae at 2, *Monsanto*, 104 S. Ct. 2862 (1984), and had the opportunity to hear this case. The Court decided instead to vacate *Union Carbide*. The case has now returned in the same posture. *Nothing has changed*. Accordingly, to decide the constitutional issues now, the Court would have to overrule its previous ripeness ruling.

The Court was correct when it declined to hear this case earlier, and, it should not retreat from that position now. The records compiled in the PPG/Stauffer arbitration and the now-pending review proceeding in district court demonstrate conclusively that consideration of the Article III issues in the context of an actual arbitration

[3] Appellees filed this case in 1976. J.S. at 4. PPG applied for its butylate registrations in 1981, offering to compensate Stauffer for EPA's reliance on Stauffer data. In 1982, Stauffer initiated arbitration. It was not until after this Court's June 26, 1984 decision in *Monsanto* and subsequent remand of this case, however, that appellees amended their complaint and alleged Stauffer's participation in an arbitration. J.S. at 7.

would foster the presentation of concrete constitutional questions. Because PPG was not a party in the court below, that court did not hear all of the considerations relevant to FIFRA's constitutionality.

The district court considering PPG's complaint benefits from the presence of all the adverse parties, and has before it a 67-page memorandum in support of PPG's motion for summary judgment, accompanied by a voluminous appendix containing the text of the arbitration award, pertinent passages from the arbitration transcript, and excerpts from the parties' arbitration briefs. PPG's motion for summary judgment addresses such issues as whether the arbitrators committed "misconduct" by awarding compensation for data submitted before 1970 in disregard of the statutory prohibition. Moreover, PPG has raised issues concerning whether Stauffer engaged in fraud in the arbitration by presenting evidence that overstated its profits. This Court has had no opportunity to consider the impact of these specific issues on the broader constitutional questions. The Court should not reach out to decide important constitutional questions out of context, without the benefit of a complete record and uninformed on the positions of all parties to an actual arbitration.

Should the Court decide, notwithstanding *Monsanto*, that the constitutional issues are ripe, PPG presents below—as it did in *Monsanto*—its position on the constitutionality of the arbitration provision. We demonstrate that the FIFRA arbitration system is constitutional only if the statute embodies legislative standards defining the arbitrators' discretion, and authorizes judicial review necessary to assure compliance with those standards. We demonstrate further that the Act interpreted in light of its legislative history fully satisfies the requirements of Article III.

II. THE FIFRA ARBITRATION SYSTEM IS CONSTITUTIONAL ONLY IF CONGRESS PROVIDED STANDARDS FOR COMPENSATION AWARDS AND JUDICIAL REVIEW TO ENFORCE THOSE STANDARDS.

Article III, Section 1 of the Constitution requires that the judicial power of the United States be exercised by judges who are protected by life tenure and nondiminishable compensation. FIFRA arbitrators, who are appointed on an *ad hoc* basis and whose salaries are set by agreement of the parties, indisputably do not satisfy these criteria. This Court has recognized, however, that Congress has discretion to prescribe the manner in which federal statutory rights are adjudicated. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81 (1982) (plurality). Thus, Congress may constitutionally assign fact-finding authority to a specialized "adjunct," so long as the adjunct's authority is "limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." *Id.* at 81 (citation omitted).

Two critical factors emerge from Supreme Court precedent for determining whether a particular delegation of federal judicial power to non-Article III decisionmakers meets the requirements of the adjunct exception. First, the adjunct's role must be narrowly limited to factual adjudication. In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court upheld a statutory system that authorized an administrative agency to make initial factual determinations concerning compensation owed by employers for work-related injuries occurring upon the navigable waters of the United States. The statute authorized compensation "irrespective of fault" and prescribed a fixed and mandatory compensation schedule.

Id. at 38. The adjunct's only role was to determine "questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made. . . ." *Id.* at 54. As this Court stated in *Northern Pipeline*, "the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law." 458 U.S. at 85.

The second critical factor in assessing the constitutionality of statutes that provide for decisionmaking by an adjunct is the amount of review power retained by Article III courts. In *Crowell*, every compensation order was appealable to federal district court, "which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (quoting *Crowell*, 285 U.S. at 44-45). This ensured the constitutionality of the system: "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Crowell*, 285 U.S. at 54.

Thus, to be constitutional, the FIFRA arbitration system must reserve "the essential attributes" of judicial power to Article III courts. *Id.* at 51. Specifically, the arbitrators must be assigned "statutorily channelled factfinding functions," *Northern Pipeline*, 458 U.S. at 85, and "the ultimate decision [must be] made by the district court," *United States v. Raddatz*, 447 U.S. 667, 683 (1980).

Federal statutes come to the Court "with the presumption that the challenged statute is valid." *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2780 (1983). Moreover, the Court should construe stat-

utes "whenever possible so as to uphold their constitutionality." *United States v. Vuitch*, 402 U.S. 62, 70 (1971). As demonstrated below, FIFRA can and should be interpreted so as to avoid the constitutional defects outlined above.

III. CONGRESS INTENDED THAT COMPENSATION BE LIMITED TO A SHARE OF THE DIRECT COSTS OF PRODUCING GOVERNMENTALLY REQUIRED TEST DATA.

A. FIFRA's Legislative History Demonstrates that Congress Mandated Compensation Based on Cost-Sharing.

FIFRA requires prospective pesticide sellers to register their products with EPA. Section 3(c)(1)(D) requires registration applicants to submit to EPA test data demonstrating the physical, biological, and chemical effects of their products. 7 U.S.C. § 136a(c)(1)(D). The Agency may grant registrations only to those products that will not cause "unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(D). FIFRA also permits other applicants to register a product identical or substantially similar to one previously registered by relying on data already in EPA's files, so long as they offer to compensate the original data submitter. *Id.* § 136a(c)(1)(D)(ii). Congress designed this "follow-on" registration procedure to promote competition in the pesticide industry by lowering entry barriers and to discourage economically wasteful, duplicative testing.[4]

[4] *See Mobay Chem. Corp. v. Costle*, 447 F. Supp. 811, 834 (W.D. Mo. 1978), *modified*, 517 F. Supp. 252 (W.D. Pa. 1981), *aff'd sub nom. Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 459 U.S. 988 (1982) ("FIFRA was not intended

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While the statutory language does not impose an explicit standard of compensation, the compensation provision would be rendered superfluous if interpreted to authorize awards greater than the cost of the required test data. In that circumstance, all potential subsequent registrants that could afford to do so would simply duplicate the tests.[5] Those that could not afford the testing costs would be shut out of the business. In either case, the compensation provision would be an unused historical curiosity, and the dual congressional goals of promoting competition and avoiding duplicative testing would be frustrated.

(Footnote 4 continued)
to shelter pesticide registrants from the rigors of commercial competition"); *Mobay Chem. Corp. v. Costle*, 12 Env't Rep. Cas. (BNA) 1572, 1578 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam) (follow-on registrations designed to prevent "the necessity of costly duplicative testing in order to produce governmentally-mandated data without thereby casting the entire burden upon the party first to meet the government's requirements by producing and submitting that data"); S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4092 (duplicative testing "would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources.")

[5] From 1978 until 1983, encompassing the times at which PPG applied for its butylate registrations, EPA regulations effectively precluded the duplicative testing option. EPA adopted a "mandatory cite-all" policy which required all applicants to offer to compensate previous data submitters even if the applicant had submitted a full complement of its own data. *See* 49 Fed. Reg. 30884 (Aug. 1, 1984). Thus, an applicant could not avoid the obligation to compensate by relying exclusively on its own data. The awarding of compensation in amounts far in excess of data costs, such as the award in the PPG/Stauffer arbitration, is

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FIFRA's legislative history demonstrates unequivocally that Congress intended compensation awards to be limited to a share of required test costs. Prior to 1972, EPA (and its predecessor, the United States Department of Agriculture) routinely relied on relevant test data contained in its files to evaluate new applications for previously registered pesticides.[6] During that time, FIFRA did not require any compensation for such reliance.

In 1972, Congress substantially amended FIFRA, and greatly increased the amount and types of data that registration applicants were required to submit, by prohibiting EPA from registering a pesticide unless it had determined that the product would not cause unreasonable adverse effects on the environment. Congress recognized that if submitted data instantly became available for free use by subsequent applicants, the new data

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(Footnote 5 continued)
particularly unfair because PPG could not choose to avoid compensation.

In *National Agricultural Chems. Ass'n v. EPA*, 554 F. Supp. 1209 (D.D.C. 1983), the court held that the mandatory cite-all regulations exceeded EPA's authority and that future applicants could avoid the obligation to compensate previous data submitters by generating their own data. EPA has recently promulgated final rules to implement this option. 49 Fed. Reg. 30884 (Aug. 1, 1984). Thus, future applicants will have the choice of generating duplicative data to avoid excessive compensation awards.

[6] *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2877 (1984) ("there is some evidence that the practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known"); S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4040-41 ("as a matter of practice," test data submitted by one registrant has "been considered by the Administrator to support the registration of the same or a similar product by another registrant").

requirements could act as a disincentive for research and development. In response to that perceived problem, large pesticide producers urged Congress to preclude reliance by subsequent registrants on data previously submitted by others to EPA.

Congress rejected these "exclusive use" proposals because such provisions would erect

> barriers to entry in the pesticides industry . . . which go far beyond that envisioned by our patent system. In effect, whether or not a pesticide has patent protection, a manufacturer wishing to register a pesticide previously registered would have to duplicate the required test data . . . . In the extreme, a monopoly in the production of a pesticide could ensue if competitors are unable to afford the sometimes costly safety and efficacy tests.

S. Rep. No. 970, 92d Cong., 2d Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4096. Moreover, the duplicative testing that would result from an exclusive use system would divert research and development funds that otherwise could be spent on new products. *Id.* Instead of exclusive use or the free use system then in effect, Congress proposed a "system under which permission to use the test data *in return for a reasonable share of the cost of producing the data* would be required." S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 69, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4089 (emphasis added). A statement designated by the Senate as "legislative intent" explained that "fairness and equity require *a sharing of the governmentally required cost of producing the test data* used in support of [the subsequent application]." *Id.* at 72-73, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4092 (emphasis

added).[7] *See also id.* (duplicative testing "would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources").

The 1972 FIFRA amendments ratified EPA's practice of relying on previously submitted data, but required subsequent applicants to offer to compensate data submitters. The statute also provided that data compensation disputes would be resolved by administrative hearings at EPA. Judicial review of compensation decisions was available in federal district court.[8] The statute thus embodied an unambiguous standard of compensation and opportunity for judicial review.

The compensation system enacted in 1972 did not specify whether data submitted to EPA prior to 1972 were compensable. In 1975, Congress resolved the uncertainty by amending FIFRA to provide that data submitted before January 1, 1970 were not subject to compensation. The 1975 FIFRA amendments also served to confirm the cost-sharing standard of compensation.

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[7] The compensation provision was not enacted in the precise form of the Senate bill. As enacted, the legislation substituted "reasonable compensation" for "reasonable share of the cost." Nevertheless, cost-sharing clearly was the intended standard. As held in the first and leading FIFRA compensation case, the change in language did not reflect a change in meaning. *Ciba-Geigy Corp. v. Farmland Indus., Inc.*, FIFRA COMP. Dkt. Nos. 33, 34 & 41, Initial Decision at 26-33 (Aug. 19, 1980), Final Order issued by the Judicial Officer (Apr. 30, 1981), Affirmed by the Administrator (July 28, 1981). *See also infra* at 18-19.

[8] The 1972 FIFRA authorized the data submitter, but not the subsequent registrant, to appeal a compensation determination, and precluded the reviewing court from reducing the amount of compensation awarded by EPA. Pub. L. No. 92-516, 86 Stat. 973 (1972). Although subject to constitutional attack, this one-sided review provision was never challenged.

In enacting the 1970 cutoff, Congress rejected the position of large pesticide manufacturers that all data, regardless of when submitted, should be compensable. In doing so, Congress confirmed that the "language" of compensation was cost-sharing: "[T]o require *cost-sharing* with respect to 'old data' . . . could create a windfall for producers of this data since such data was prepared without any reasonable expectation that the law would require *sharing of the costs* of production." S. Rep. No. 452, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1367-68 (emphasis added). Congress thus also confirmed that the imposition of a compensation obligation on "old data" would have vitiated the congressional objectives underlying FIFRA by raising barriers to market entry, thereby neutralizing the procompetitive effects of compensation. Moreover, such a provision would not have created any incentive for future research and development since compensation for such data would merely reward past efforts.[9]

The Committee further explained that compensation was designed "to provide for *equitable sharing among industry members of the cost of producing data* necessary to obtain or continue a registration under the Act." *Id.* at 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News at

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[9] By establishing a 1970 cutoff, rather than precluding compensation for data submitted prior to the effective date of the 1972 amendments, Congress did provide a limited windfall for data submitters. The 1970 date, however, emerged from the Conference Committee as a compromise between the differing versions of the two Houses. *See* H.R. Conf. Rep. No. 668, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1380. The House of Representatives had proposed that all old data be compensable, H.R. Rep. No. 497, 94th Cong., 1st Sess. 25 (1975), while the Senate had proposed an October 21, 1972 cutoff, S. Rep. No. 452, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1360.

1367 (emphasis added). Finally, several members of the House Committee on Agriculture stated in supplemental views contained in the Committee Report:

> Reasonable compensation should be an equitable *sharing* of the direct costs of producing governmentally required test data. It should not be based upon a "value" basis. No profit should accrue to the original applicant . . . .

H.R. Rep. No. 497, 94th Cong., 1st Sess. 65 (1975) (emphasis in original).[10]

Congress amended FIFRA again in 1978 to restrict further the compensation obligation by providing that data are subject to compensation only for fifteen years after their submission to EPA. Congress also restated its intention that compensation be limited to cost-sharing.[11] The legislative history of the 1978 amendments states that the compensation provision recognizes "the cost of data development and the need for *cost sharing* among registrants." S. Rep. No. 334, 95th Cong., 1st Sess. 4

[10] The 1975 amendments also removed uncertainty over the constitutionality of the compensation provision by providing that both parties to a compensation dispute were entitled to judicial review, and authorizing the reviewing court to increase or decrease the compensation ordered by EPA.

[11] As a further incentive for research and development, Congress provided that data on *new products* submitted after September 30, 1978 (the effective date of the amendments) would be protected from use by subsequent registrants for ten years, subject to cost-sharing for a maximum of five years, and thereafter be available for free use. *See* 7 U.S.C. § 136a(c)(1)(D). In limiting this heightened level of protection to data on innovative products and for a term of ten years, Congress minimized the anticompetitive effects of the provision. Senator Leahy, a sponsor of the legislation, explained that the restrictions on

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(1977) (emphasis added). The legislative history further explained:

> The amendments in S. 1678 recognize the proprietary interest in health and safety data on the part of pesticide registrants who underwrite the expense of obtaining such data. It eliminates the "free-rider" situation to which industry has objected, but *keys the amount of payment by subsequent registrants to the costs of developing data necessary for government approval, not the costs of developing the pesticide.* The amendments also avoid an extension of the patent rights on chemicals.

Id. at 31 (emphasis added).

FIFRA's legislative history thus establishes unequivocally that Congress intended compensation to be limited to a share of the direct cost of tests required for registration. Indeed, such an interpretation is the only one consistent with FIFRA's purposes. The cost-sharing standard facilitates the statutory goal of avoiding duplicative testing, promotes competition by lowering barriers to entry, and provides an incentive for research and development by allowing for partial reimbursement of data costs.

(Footnote 11 continued)
exclusive use "largely confined [such] coverage to chemicals that are patentable and for a term generally shorter than the patent life enjoyed by pesticides." 124 Cong. Rec. S15303 (daily ed. Sept. 18, 1978). Notably, Congress did not increase the protection for previously submitted data or future data on old products; since those products were already developed, there was no need for further incentives.

B. Administrative and Judicial Interpretations of FIFRA Confirm the Cost-Sharing Standard of Compensation.

Before Congress established mandatory arbitration as the means for resolving data compensation disputes, an EPA administrative law judge ("ALJ") was assigned that responsibility. The only two decisions rendered under that system awarded the data submitter a share of its data costs as compensation. Moreover, federal courts that have considered FIFRA's compensation provision in the course of reviewing other aspects of the statute's constitutionality have determined that compensation is limited to data costs. All of these decisions have a common characteristic: in each case, the decisionmaker undertook an analysis of the legislative history set forth above.

In both the compensation decisions rendered after an administrative hearing before EPA, the ALJ relied on FIFRA's legislative history and purposes to hold that Congress intended to require subsequent registrants to pay only a share of data costs. *Ciba-Geigy Corp. v. Farmland Industries, Inc.*, FIFRA COMP. Dkt. Nos. 33, 34 & 41, Initial Decision (Aug. 19, 1980), Final Order issued by the Judicial Officer (Apr. 30, 1981), Affirmed by the Administrator (July 28, 1981); *Union Carbide Agricultural Products Co. v. Thompson-Hayward Chemical Co.*, FIFRA COMP. Dkt. No. 27 (July 13, 1982). These rulings by EPA that the compensation provision embodies a cost-sharing standard should be treated with considerable deference by the Court. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984) ("[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

In both cases, the ALJ categorically rejected awards proposed by the original data submitters that would have produced compensation payments in excess of data costs. Such results would have been contrary to the congressional purposes of avoiding duplicative testing and reducing barriers to market entry. A cost-sharing standard of compensation furthered those goals by recognizing the data submitter's interest in recovering its costs and "the equally important public interest of keeping costs of entry into the pesticide business attributable to government regulation as low as possible." *Farmland*, Initial Decision at 46. Moreover, given Congress' repeatedly expressed concern that duplicative testing was economically wasteful, it certainly intended compensation to "result in lower costs to subsequent registrants than if they had to duplicate the tests." *Thompson-Hayward*, Initial Decision at 21.

The original data submitters in the *Farmland* and *Thompson-Hayward* cases improperly attempted to use the statutory compensation requirement to reward research and development. The ALJ reasoned that Congress did not intend compensation to be used "to extend the rewards for . . . research and development . . . beyond the period allowed by the patent grant." *Farmland*, Initial Decision at 30. The ALJ succinctly summarized the underlying purpose and scope of compensation as follows:

> FIFRA, of course, added another dimension to the marketing of pesticides, namely the additional cost in getting a product to market that may be imposed by FIFRA's registration requirements. It seems

> clear from the legislative history that Congress felt as a matter of fairness, if for no other reason, that the first registrant should not be saddled with the entire burden of this additional cost. But it would appear that it was only with the incremental cost of obtaining a registration that Congress appears to have been concerned about, and the desirability of neutralizing any adverse effect on research and development which would be caused if the entire testing cost were imposed on the first registrant. Over and above this, the incentive for research and development, and a company's investment in it, would still have to come from the profits to be gained in the sale of the product and from whatever competitive advantage accrued to it from patents or secret processes.

Thompson-Hayward, Initial Decision at 21.

Several federal courts also found a cost-sharing compensation standard in the course of considering constitutional challenges to FIFRA. In *Chevron Chemical Co. v. Costle*, 641 F.2d 104 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981), while ruling that FIFRA did not effect an unconstitutional taking of property, the court quoted FIFRA's legislative history in explaining its understanding of compensation:

> [I]t was decided that equity and fairness required a sharing of the governmentally required cost of producing the test data used in support of an application by an applicant other than the originator of such data.

641 F.2d at 109 (footnote omitted). *See also Amchem Products, Inc. v. GAF Corp.*, 594 F.2d 470, 481 (5th Cir.), *modified*, 602 F.2d 724 (5th Cir. 1979) ("[i]t was never the intent of Section 3(c)(1)(D) to provide more than an equitable sharing of research costs"); *Chevron Chemical Co. v. Costle*, 443 F. Supp. 1024, 1028 n.2 (N.D. Cal. 1978)

(purpose of data compensation was "saving the cost of duplicative testing").

In *Mobay Chemical Corp. v. Costle*, 12 Env't Rep. Cas. (BNA) 1572 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam), a three-judge court rejected the contention that FIFRA violated the taking clause of the fifth amendment. In reaching that conclusion, the court reasoned that the compensation system provided limited protection to "the expenditure of the first applicant in generating the data." *Id.* at 1578. The court added that

> neither the legislative history nor the plain language of § 3 indicate[s] that in adopting its regulatory scheme Congress was concerned with ensuring maintenance of competitive commercial positions of the original submitters of data. Rather, the *Congressional concern in adopting the original § 3(c)(1)(D) in 1972 was for maximum allocation of resources in the public interest—preventing the necessity of costly duplicative testing* in order to produce governmentally-mandated data without thereby casting the entire burden upon the party first to meet the government requirements by producing or submitting that data.

Id. (citing S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72-73, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4092) (emphasis added).

Finally, in another case entitled *Mobay Chemical Corp. v. Costle*, 447 F. Supp. 811 (W.D. Mo. 1978), *modified*, 517 F. Supp. 252 (W.D. Pa. 1981), *aff'd sub nom. Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 459 U.S. 988 (1982), the court rejected a broad-based attack on FIFRA and concluded that:

> FIFRA was not intended to shelter pesticide registrants from the rigors of commercial competition.

> The protection afforded by § 3(c)(1)(D) extends only to compensation for producing the test data used in the registration process, and not to the ultimate economic or commercial benefits which may flow from the registration itself.

447 F. Supp. at 834.

Two federal court decisions stand in stark contrast to the above cases, both in terms of their holdings that FIFRA is unconstitutional and their failure to find a standard of compensation. In *Monsanto Co. v. Acting Administrator EPA*, 564 F. Supp. 552, 567 (E.D. Mo. 1983), *vacated sub nom. Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), the court found "the absence of a formula of [*sic*] a guidance on the evaluation of data for compensation purposes." In the instant case, the court below concluded that FIFRA appeared to provide "a standardless delegation of powers." *Union Carbide Agricultural Products Co. v. Ruckelshaus*, 571 F. Supp. 117, 124 (S.D.N.Y. 1983), *vacated*, 104 S. Ct. 3566 (1984). Neither district court opinion evidences any examination of FIFRA's legislative history. Thus, it is not surprising that both courts failed to find a standard of compensation.

One last decision, the award in the PPG/Stauffer arbitration, also failed to find a cost-sharing standard of compensation. The arbitrators reached that result despite PPG's repeated citation of the legislative history discussed above. The award contains not a single sentence relating to a standard of compensation, nor any discussion of the legislative history. The award imposes on PPG a compensation obligation at least six times greater than the cost of the data. Such an award produces results totally at odds with Congress' purposes in enacting FIFRA.

IV. FIFRA SHOULD BE INTERPRETED TO PROVIDE JUDICIAL REVIEW OF ARBITRATION AWARDS.

The constitutionality of the FIFRA mandatory arbitration system depends in part on whether Congress provided sufficient opportunity for judicial review by Article III courts of compensation awards issued by nonjudicial arbitrators. *Northern Pipeline*, 458 U.S. at 81; *Raddatz*, 447 U.S. at 682. The FIFRA provisions delegating compensation determinations to arbitrators can be interpreted to meet constitutional standards. The judicial review provision in FIFRA, as well as federal courts' inherent authority to review arbitration awards, authorize Article III courts to assure that FIFRA arbitrators follow the congressional standard of compensation.

FIFRA provides that arbitration awards may be reviewed for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator."[12] 7 U.S.C. § 136a(c)(1)(D)(ii). The arbitrators in the PPG/Stauffer proceeding correctly recognized that "'misconduct' on the part of arbitrators can include their acting in excess of their powers, or 'perversely misconstruing the law.'" Arbitration Award at 2 n.* (quoting *Amicizia Societa Navigazione v. Chilean Nitrate*

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[12] Congress' substitution in 1978 of private arbitration for EPA administrative hearings as the mechanism for determining arbitration enables EPA to focus limited resources on health and safety issues rather than resolution of private disputes. Senator Leahy, a sponsor of the 1978 amendments, explained that "[d]etermining the amount and terms of . . . compensation are matters that do not require active governmental involvement [;they] should be determined to the fullest extent practicable, within the private sector." 123 Cong. Rec. S13095 (daily ed. July 29, 1977).

Etc., 184 F. Supp. 116 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 805 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960)). Thus, "misconduct" by arbitrators must include disregard of a congressional mandate that compensation be limited to cost-sharing, if such a standard is to have any substance.[13] Accordingly, FIFRA provides ample authority for Article III courts to review arbitration awards.

Moreover, there are no grounds for attributing to Congress the intent in FIFRA to abrogate the settled principles of judicial review of arbitration awards. As this Court has held, arbitration decisions are subject to judicial review to ensure that the arbitrators have not exceeded their lawful authority. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Arbitrators' powers are circumscribed by the source from which their authority is derived. *Monongahela Power Co. v. Local No. 2332*, 566 F.2d 1196, 1199 (4th Cir. 1976). Whether arbitrators have exceeded the scope of their authority "is an issue for judicial resolution." *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580, 583 (5th Cir. 1980). When the court finds that arbitrators have exceeded their authority, their

[13] The provision of review for misconduct is consistent with the fact that arbitrators need not be trained decisionmakers or even lawyers. The delegation of authority to arbitrators facilitates the resolution of data compensation disputes by persons with expertise in the health and safety field. *See* H.R. Rep. No. 663, 95th Cong., 2d Sess. 43, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1988, 2016 (FIFRA arbitrators "should be persons experienced in the pesticide field and, in particular, research and development of pesticides"). In these circumstances, it is all the more important that federal courts be in a position to review the arbitrators' decision to determine if they have acted "in excess of their powers."

awards "cannot be enforced." *United States Postal Service v. National Rural Letter Carriers Association*, 535 F. Supp. 1034, 1037 (N.D. Ohio 1982).

When arbitrators' authority derives from a contract between the parties, the resultant award is invalid and unenforceable if the arbitrators exceeded their powers under the contract. The award must be overturned unless it "draws its essence from the collective bargaining agreement." *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Courts will deny enforcement to and vacate awards that exceed the arbitrators' contractual authority. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979); *Washington Hospital Center v. Service Employees International Union*, 112 L.R.R.M. (BNA) 3008 (D.D.C. 1983); *Zeigler Coal Co. v. District 12, United Mine Workers of America*, 484 F. Supp. 445, 447 (C.D. Ill. 1980); *International Brotherhood of Electrical Workers v. E.I. DuPont de Nemours & Co.*, 420 F. Supp. 208, 210 (E.D. Va. 1976).

FIFRA arbitrators' power derives not from a contract, but from a statute that imposes mandatory arbitration. Because of the due process implications of such a procedure,[14] Congress must have intended for federal courts

[14] The mandatory nature of the arbitration provision raises substantial due process problems. *See Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923); *Midkiff v. Tom*, 471 F. Supp. 871, 883-84 (D. Hawaii 1979); *United Farm Workers v. Babbitt*, 449 F. Supp. 449, 466 (D. Ariz. 1978), *rev'd on other grounds*, 442 U.S. 289 (1979). Due process requires that the FIFRA arbitrators be limited to a carefully circumscribed fact-finding role, and not engage in the interpretation of a complex federal statute. *See Mount St. Mary's Hospital v. Catherwood*, 26 N.Y.2d 493, 311 N.Y.S.2d 863, 872 (Ct. App. 1970) (provision of mandatory "*ad hoc* arbitration tribunals to resolve disputes

(Footnote continued on next page)

to review FIFRA compensation determinations carefully and vacate awards if the arbitrators exceed their statutory authority. So construed, FIFRA is constitutional.

CONCLUSION

For the reasons set forth above, PPG submits that FIFRA delegates to arbitrators a narrow fact-finding role, subject to judicial review. Thus, the mandatory arbitration provision is constitutional.

Respectfully submitted,

THOMAS H. TRUITT
DAVID R. BERZ
JEFFREY F. LISS
PAUL E. GUTERMANN
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for PPG Industries, Inc.

January 10, 1985

(Footnote 14 continued)
without limitation to rules of law" is unconstitutional). Due process also requires that there be judicial review adequate to ensure that FIFRA arbitrators' factual findings are supported by evidence in the record and are not arbitrary or capricious. Such safeguards guarantee that the awards "imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith, but in law and the record before him." *Id.* at 873 (citation omitted).

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No. 84-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF OF GRIFFIN CORPORATION AND DREXEL CHEMICAL COMPANY AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

DAVID B. WEINBERG *
WILLIAM R. WEISSMAN
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Attorneys for Griffin Corporation and Drexel Chemical Company

* Counsel of Record

January 10, 1985

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---

BRIEF OF GRIFFIN CORPORATION AND DREXEL CHEMICAL COMPANY AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

For the second time in two years, large pesticide producers have mounted a constitutional attack on the pesticide registration scheme established by the Federal Insecticide, Fungicide, and Rodenticide Act, *as amended*, 7 U.S.C. §§ 136a-136y (1982) ("FIFRA"). Last Term, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. ——, 104 S. Ct. 2862 (1984) (hereafter "*Monsanto*"), this Court upheld the data licensing and disclosure provisions of

FIFRA under the Taking Clause of the Fifth Amendment and determined that a challenge to the statutory compensation provision was not ripe for review. Shortly thereafter, the Court vacated the district court's decision in the instant case, which had enjoined enforcement of the registration scheme. The district court had concluded that the statutory provision for resolution of compensation disputes before an arbitrator violated Article III of the Constitution. This Court directed the district court to reconsider its decision in light of *Monsanto. Ruckelshaus v. Union Carbide Agriculture Products Co.*, 468 U.S. ——, 104 S. Ct. 3566 (1984). On reconsideration, the district court reinstated its original decision and again enjoined enforcement of the registration scheme. J.S. App. 21a-22a.[1]

Griffin Corporation ("Griffin") and Drexel Chemical Company ("Drexel"), both of which are small pesticide producers whose products have been registered or await registration under this statute, file this brief as *amici curiae* in support of the Administrator of the Environmental Protection Agency ("EPA") to illustrate the drastic impact affirmance of the decision below would have on small producers, the American farmer, and the consumer. The Solicitor General and the appellees have consented to the filing of this brief; letters so indicating are being filed with the Clerk.

Griffin is a privately-held Georgia corporation headquartered in Valdosta, Georgia, with additional manufacturing facilities in Texas. Its products are sold primarily in California, Florida and Georgia. Griffin's annual sales volume is approximately $50 million, over half of which derives from the sale of products which are registered

[1] References to the Jurisdictional Statement and its Appendix are cited as "J.S." and "J.S. App." respectively. On October 19, 1984, this Court stayed the district court's injunction. 469 U.S. ——, 105 S. Ct. 237.

under the invalidated scheme. It also has applications for amendments of existing registrations pending with EPA, and anticipates filing ten to twelve additional applications this spring.

Drexel Chemical Company is a Tennessee corporation based in Memphis, Tennessee. Drexel does business primarily in the central and southeastern United States and has annual domestic sales of approximately $30 million. About 50 percent of Drexel's revenues are derived from products registered under the regulatory program invalidated by the district court in this case. Drexel expects to file 15 to 20 applications in the near future.

Griffin and Drexel are typical of small manufacturers and formulators of pesticide products which play a vital role in maintaining competition in the marketplace. Specific examples of the benefits of these companies' market participation are described at pages 18-20 *infra*.

FIFRA requires marketers of pesticide products to obtain a registration from the EPA before the product can be marketed in the United States. § 3(a), 7 U.S.C. § 136(a). EPA bases its decision to register a product, in part, on test data intended to show that the pesticide will not cause "unreasonable adverse effects on the environment." §§ 3(c)(5)(C)&(D), 7 U.S.C. §§ 136a(c)(5)(C)&(D); *Monsanto*, 104 S. Ct. at 2867-68. Assembling such data is a costly and time consuming process.[2] As a result, if each producer were compelled to generate its own test data in order to obtain the regulatory license

[2] EPA recently found that the 1980-81 cost of the testing necessary to support a registration was approximately $1.9 million to $2.8 million per active ingredient. EPA, REGULATORY IMPACT ANALYSIS: DATA REQUIREMENTS FOR REGISTERING PESTICIDES UNDER THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT 14-15, 70, 72 (1982). The Senate Committee on Agriculture, Nutrition, and Forestry's 1977 estimate of the testing cost per pesticide was $7 million. S. REP. No. 334, 95th Cong., 1st Sess. 30 (1977).

to market a pesticide, only firms with large financial resources, like the appellees in this case, could surmount the costly barriers to market entry erected by the regulatory scheme.

In 1972, Congress sought to minimize these regulatory market entry barriers by amending FIFRA to allow EPA to consider data submitted by one applicant in support of a second applicant's product containing the same active ingredients.[3] The second applicant still would apply to EPA for a registration, but in doing so could establish the safety of the product by relying on test data submitted by the initial registrant instead of submitting his own data, provided that the second applicant offered to compensate the first applicant for the use of his data. EPA was empowered to fix the amount of compensation, subject to limited judicial review, if the parties were unable to agree on the amount. § 3(c)(1)(D), 86 Stat. 979 (1972); *Monsanto*, 104 S. Ct. at 2868. These procedures allowed small pesticide producers to market products chemically identical to previously registered pesticides without having to duplicate the costly testing process incurred by the original registrant.[4]

Congress again amended § 3(c)(1)(D) in 1975 and 1978,[5] but only the latter amendments are relevant to

[3] Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (1972).

[4] As a practical matter, only unpatented products or pesticides whose patents had expired were eligible for registration by a second applicant without the original registrant's consent. One of Congress' concerns in adopting the 1972 amendments was that a requirement that each applicant submit his own data could effectively extend patent monopolies beyond those authorized by the patent system. *See* S. REP. No. 970, 92d Cong., 2d Sess. 12, 14, 16 (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4092, 4096, 4098, 4100.

[5] Pub. L. No. 94-140, 89 Stat. 751 (1975); Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (1978).

this case. Those 1978 amendments granted to original registrants a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i), 7 U.S.C. § 136a(c)(1)(D)(i). All other data submitted after 1969 could be considered in support of a later application. However, if the data were considered in support of a later application within 15 years of its original submission, the second applicant had to offer compensation to the original submitter of the data. Compensation disputes no longer were to be resolved by EPA, but by an arbitrator appointed by the Federal Mediation and Conciliation Service. § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(c)(1)(D)(ii). Data not subject to the 10-year exclusive use or 15-year compensation provisions were open to consideration by EPA in support of a subsequent application without compensation to the original submitter. § 3(c)(1)(D)(iii), 7 U.S.C. § 136a(c)(1)(D)(iii); *Monsanto*, 104 S. Ct. at 2869. Thousands of "follow-on" (also known as "me-too") pesticide products have been registered under this regulatory scheme, and thousands more are expected to be registered if the Court upholds the statute.

Griffin and Drexel joined with several other similarly situated pesticide producers last Term in urging this Court in *Monsanto* to uphold the registration scheme under the Taking Clause.[6] As we pointed out in *Monsanto*, the effect of invalidating the registration scheme under the Taking Clause would have been to drive most small pesticide formulators and producers out of the market because these firms lack the financial resources to assemble the necessary test data on their own. Even as to the few companies that could undertake their own test-

[6] *See* Brief of Pesticide Producers Ass'n et al. as *Amici Curiae*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. ——, 104 S. Ct. 2862 (1984).

ing, the effect of requiring them to do so when EPA already has registered a pesticide with the same active ingredients would be to waste scarce scientific resources and millions of dollars in testing expenditures merely to duplicate the information already in EPA's files.[7] A decision this Term that the FIFRA registration scheme fails to pass constitutional muster under Article III again would thwart Congress' assessment that the public interest warrants increased competition in the marketing of pesticides and elimination of wasteful duplication of testing. The many small pesticide producers and formulators that have flowered under this regulatory program would wither rapidly if the "follow-on" scheme is struck down. The present *amici* accordingly urge the Court again to sustain FIFRA's registration scheme as a valid exercise of congressional authority to balance the benefits and burdens in the marketing of safe pesticide products in United States commerce.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are filing this brief as *amici curiae* not to duplicate the parties' briefs, which undoubtedly will address fully the significant constitutional issues presented by this case, but to outline our position on the issues presented and to call to the Court's attention the practical ramifications of invalidating the entire follow-on registration scheme.

As a threshold matter, there is no greater justification for adjudicating in this case the constitutional validity of the arbitration provision than there was in *Monsanto*. No party in this case has been injured by reason of an arbitration under this statute, and hence the issue is not ripe for review. *Monsanto*, 104 S. Ct. at 2882. Only one of the appellees has even been involved in an arbitration proceeding under this statute; that party currently is

[7] *Id.* at 3-4.

engaged in separate litigation arising out of that arbitration in which it seeks to recover the sum awarded in the arbitration. This appellee's position in that case is inconsistent with its claim of injury here.

Nevertheless, if the Court reaches the merits, nothing in Article III forbids Congress from assigning resolution of compensation disputes arising under this statute to arbitrators, subject to limited judicial review, instead of to federal judges. A compensation claim under FIFRA stems from a right created by Congress, and Congress may assign to particularized non-Article III tribunals the vindication of such statutory rights. In any event, the statute provides for limited judicial review of arbitration decisions before an Article III tribunal to assure the fairness of the proceedings and compliance with the limits of the arbitrator's authority. The Constitution requires no more extensive form of judicial review.

A contrary conclusion on the constitutionality of the arbitration scheme does not justify the broad injunction striking down virtually the entire FIFRA registration scheme which district court ordered. The proper remedy in such a circumstance is either to strike the limitation on judicial review or, at most, the arbitration provision. The former would permit United States district courts to review the lawfulness of arbitration awards under the jurisdiction that would have existed under current law but for the limitation on judicial review. *See* 28 U.S.C. §§ 1331, 1337(a) (1982); FIFRA § 16(c), 7 U.S.C. § 136n(c). The latter would reinstate EPA's responsibility to resolve compensation disputes. Congress itself has directed this finely tuned surgical approach to constitutional adjudication by enacting in FIFRA a severability clause (§ 30, 7 U.S.C. § 136x) establishing a presumption that Congress would have enacted the unobjectionable portion of the statute without the provision found to be unconstitutional. The surviving portions of the statute are fully workable as a regulatory scheme, and their

preservation is consistent with Congress' stated priority that the compensation mechanism not be used to prevent prompt registration of eligible pesticides.

ARGUMENT

I. BECAUSE THE APPELLEES HAVE NOT BEEN INJURED AS A RESULT OF AN ACTUAL ARBITRATION, THE CONSTITUTIONALITY OF THE ARBITRATION PROVISION OF FIFRA IS NOT RIPE FOR REVIEW

The Court held last Term that Monsanto's challenge under Article III to the compensation arbitration provision in § 3(c)(D)(ii) of FIFRA, 7 U.S.C. § 136a(c)(D)(ii), was not ripe for review and that "[o]nly after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." *Monsanto*, 104 S. Ct. at 2882. Despite this Court's remand of the district court's earlier decision for reconsideration in light of *Monsanto* (104 S. Ct. 3566), the district court again enjoined the registration scheme on the theory that the arbitration provision violates Article III.

The facts have not changed since this case was last here and the Court vacated the district court's original decision. Only one of the appellees—Stauffer Chemical Company ("Stauffer")—has invoked the statutory arbitration mechanism,[8] and that party, as was true last Term, is a defendant and counterclaimant in separate litigation in the United States District Court for the District of Columbia involving that arbitration. *PPG Industries, Inc. v. Stauffer Chemical Co.*, Civ. Action No. 83-1941 (D.D.C. filed July 7, 1983). There is no reason why Stauffer should be permitted to bifurcate its objections to the arbitration process; it can raise all the constitutional arguments it advances here in the District of Columbia action where they can be addressed in the factual context of an actual arbitration, not, as this Court has described it, "in the rarefied atmosphere of a debating society . . . ." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[8] The appellees, other than Stauffer, do not claim that they have participated in or been injured by any FIFRA arbitration. They stand in the same position that Monsanto was in when this Court ruled that the issue is not ripe for review. *See Monsanto*, 104 S. Ct. at 2882.

In any event, Stauffer's present claim of injury from an actual arbitration is inconsistent with its posture in the District of Columbia litigation. Instead of asserting that the award is inadequate, Stauffer has asked the District of Columbia court to enforce the award or, alternatively, to award it damages equal to the arbitration award.[9] Stauffer's position is tantamount to "having its cake and eating it too." It may once have sought a higher award than it received in the arbitration, but in the District of Columbia action Stauffer has acquiesced in the amount awarded by seeking either its enforcement or damages of an equivalent amount.

Given its professed satisfaction with the arbitration award, Stauffer cannot "establish that it had been injured by actual arbitration under the statute." *Monsanto*, 104 S. Ct. at 2882. In the absence of such injury, Article III's requirement of a case or controversy has not been satisfied, and, accordingly, Stauffer lacks standing to

[9] As the Solicitor General has pointed out (J.S. at 8 n.6), Stauffer has counterclaimed against PPG Industries, Inc. ("PPG"), the company whose pesticide was registered on the basis of Stauffer's data, for enforcement of the award, and alternatively has cross-claimed against EPA for a declaration that the statute violates Article III. It also has sought cancellation of PPG's registration and damages equal to the arbitration award in the event the compensation provision were struck down.

challenge the arbitration provision. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. at 472; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974).

II. FIFRA'S ARBITRATION PROVISION FOR RESOLVING COMPENSATION DISPUTES IS CONSTITUTIONAL

Prior to 1978, resolution of compensation disputes between original submitters of data and follow-on registrants relying on those data was assigned to EPA. The agency's decision was subject to judicial review. § 3(c)(1)(D), 86 Stat. 979-80 (1972). In 1978, when Congress revised the FIFRA registration system, it reassigned responsibility for resolving compensation disputes to an arbitrator appointed by the Federal Mediation and Conciliation Service.[10] The arbitrator's decision was subject to judicial review only for fraud, misrepresentation or other misconduct. The substantive standard for determining compensation was unchanged by the 1978 amendments.

The district court's conclusion that the arbitration provision added to FIFRA in 1978 violates Article III rests on a misreading of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). What the Court struck down in *Northern Pipeline* was the assignment of authority to adjudicate traditional common law rights to non-Article III bankruptcy judges. *See id.* at 84 (plurality); *id.* at 90 (Rehnquist, J., concurring). A compensation claim arising under FIFRA involves a statutory claim created by Congress, not a common law right. *See Monsanto*, 104 S. Ct. at 2881 & n.21. The Court's holding did not apply to statutory rights established by Congress. The plurality observed that an entirely different situation arises when Congress creates a non-Article III forum to adjudicate a substantive right created by Congress. In such a situation, Congress "may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right." 458 U.S. at 83 (footnote omitted). The district court completely overlooked that critical distinction.

The district court objected to the statutory provision that limits judicial review of arbitration decisions to cases of " 'fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator.' " J.S. App. 20a, quoting § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(c)(1)(D)(ii). According to the district court, "courts play no role in factfinding" under this provision and "are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding." J.S. App. 20a. Although, as we explain below, the district court overstated the extent to which federal courts are deprived of any meaningful role under this statute, the basic flaw in that court's reasoning is its failure to recognize that this Court has upheld numerous statutes in which decisions by a non-Article III official or tribunal are not reviewable by an Article III court. *See, e.g., Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320, 325 (1972); *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966); *United States v. California Eastern Line, Inc.*, 348 U.S. 351, 354-55 (1955); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303 (1943). There is no constitutional requirement that every decision of an Executive Branch official must be reviewable before an Article III tribunal.

In any event, the district court also was in error when it assumed that this case presents the extreme circum-

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[10] Congress' aim was to minimize active governmental involvement in the compensation process and thereby to reduce EPA's regulatory burden. *See* 123 CONG. REC. S13095 (daily ed. July 29, 1977) (remarks of Senator Leahy); S. REP. No. 334, 95th Cong., 1st Sess. 8 (1977).

stance of an executive decision totally unreviewable in any meaningful sense in an Article III forum. To be sure, Congress sought to minimize the litigation burden on federal courts stemming from this regulatory statute, and hence authorized only a highly deferential and limited form of judicial review tailored to the typical judicial role in cases involving arbitrations. Most important, however, it preserved the judicial role to assure the integrity and fairness of the arbitration process, to prevent the arbitrator from exceeding his jurisdiction, and to protect against a manifest disregard of the law. *See, e.g., Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (undisclosed financial relationship between arbitrator and one of the parties renders award invalid); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (award exceeding arbitrator's authority is nonenforceable); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (award based on manifest disregard of the law is nonenforceable). *See also* Arbitration Act § 10, 9 U.S.C. § 10 (1982). Nothing in Article III requires a more intrusive form of judicial review.

When Congress revamped the FIFRA registration scheme in 1978, no doubt it could have left the task of resolving compensation disputes with the EPA Administrator as it had been since 1972. No serious constitutional objections could be proffered to such an agency function without casting doubt on a variety of long-standing regulatory statutes which delegate to an agency the authority to adjudicate damage or reparation claims arising under the regulatory statute.[11] Given Congress' desire to ease the burden on the EPA Administrator

[11] *See, e.g.*, Interstate Commerce Act, 49 U.S.C. § 11705(c) (1982); Communications Act §§ 207-09, 47 U.S.C. §§ 207-09 (1982); *Crowell v. Benson*, 285 U.S. 22 (1932) (agency determination of employee compensation claims against employers consistent with Article III).

without adding to that of the federal judiciary, it was not precluded by Article III from reassigning from one Executive Branch appointee (the EPA Administrator) to another (the arbitrator appointed by the Federal Mediation and Conciliation Service) the duty of resolving compensation disputes arising under this congressionally-established regulatory scheme, subject to limited judicial review.[12]

III. THE REGISTRATION SCHEME IS SEVERABLE FROM THE ARBITRATION PROVISION AND SHOULD NOT HAVE BEEN ENJOINED EVEN IF THE LATTER IS UNCONSTITUTIONAL

Section 30 of FIFRA, 7 U.S.C. § 136x, provides:

> If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect without regard to the invalid provision or application, and to this end the provision of this Act are severable.

The district court ignored this severability clause when it entered a sweeping injunction that struck down not

[12] Without any analysis or discussion of the legislative history, the district court also indicated agreement with the appellees' claim that the compensation provision constitutes a standardless delegation of power in violation of *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). J.S. App. 19a. We agree with the argument advanced by *amicus* PPG Industries in this case that the legislative history of the 1972 and 1978 amendments to FIFRA manifests an unequivocal intent by Congress to base compensation awards on a sharing of the required testing costs and that EPA, the agency charged with administering the statute, construed it in that manner at the time it had statutory responsibility for resolving compensation disputes. *See* PPG Industries, Inc. Brief as *Amicus Curiae* at 12-20. EPA's interpretation of the statute is entitled to considerable deference. *See, e.g., Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. ——, 104 S. Ct. 2778, 2782-83 (1984).

merely the arbitration provision that it had found to be invalid, but virtually the entire provision for follow-on registration of pesticides. J.S. App. 21a-22a.

Even if the district court were correct in declaring the arbitration provision unconstitutional, its injunction is far broader than necessary to eliminate the objectionable portion of the statute and plainly is incompatible with the presumption established by the severability clause that "Congress clearly intended 'the remainder of the Act' to stand if 'any particular provision' were held invalid." *INS v. Chadha*, 462 U.S. 919, ——, 103 S. Ct. 2764, 2774 (1983). Nothing in the statute or legislative history suggests that Congress intended the validity of the follow-on registration provision to depend on the validity of its chosen forum for resolving compensation disputes. Indeed, there is every indication that registration of pesticides was Congress' first priority, and that the registration scheme is not to be held hostage to the mechanics of compensating the original data submitter.

First, the arbitration provision was not part of the original follow-on registration scheme enacted by the 1972 amendments, but rather was grafted onto the scheme in 1978. The shift of responsibility to resolve arbitration disputes from EPA to arbitrators to ease the burdens placed on EPA was only a minor element of the 1978 amendments; their major focus was to reinvigorate and streamline the follow-on registration program which had become an "administrative nightmare in which the process of registering new pesticides simply [had] ground to a halt." *Chevron Chemical Co. v. Costle*, 641 F.2d 104, 111 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981); *see also Monsanto*, 104 S. Ct. at 2868-69.[13] There is utterly no

[13] According to the Senate Committee Report:

> The single largest problem is the fact that the registration and reregistration process has ground to a virtual halt. The registration process is the foundation of the entire pesticide program. This problem has impacted upon the structure of the industry, the availability of pesticides, and overall implementation of the Act.

S. REP. No. 334, 95th Cong., 1st Sess. 3 (1977).

basis for assuming that Congress "'would not have enacted those provisions which are within its power [*i.e.*, the follow-on registration provision], independently of that which [the district court held] is not'" within its power (*i.e.*, the assignment of responsibility for fixing compensation to federally-appointed arbitrators). *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). In light of this sequence of events, the district court should have severed the arbitration provision from the balance of the statute, and under *Frost v. Corporation Commission*, 278 U.S. 515 (1929), could have revived the provision that assigned to EPA responsibility for fixing compensation that the arbitration provision had superseded.

Second, while Congress plainly regarded the availability of compensation as an important element of the regulatory scheme, it also left no doubt that its paramount aims were to promote competition in the pesticide industry and to eliminate wasteful duplication of testing by prompt implementation of the follow-on registration program. To assure that the registration program would not be held hostage to the compensation process, Congress specifically provided in the statute that "[r]egistration action by the Administrator shall not be delayed pending the fixing of compensation." § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(c)(1)(D)(ii). It is difficult to conceive of a clearer statement of Congress' intent that the mechanics of compensation not interfere with prompt registration of competitive pesticides found to be safe and effective.[14]

[14] The Senate Committee Report stressed that controversies over data compensation should not be permitted to undermine the regis-

Third, Congress included in the statute a broad grant of jurisdiction to district courts "specifically to enforce, and to prevent and restrain violations of" FIFRA. § 16(c), 7 U.S.C. § 136n(c). If, as the district court believed, the principal constitutional objection to the arbitration provision was the lack of adequate judicial review by an Article III court, the district court could have remedied the constitutional objection with minimum violence to the surrounding statute simply by removing the offending language limiting judicial review. The result of such a careful excision would have been to permit arbitration awards to be enforced or enjoined under the district courts' residual jurisdiction under § 16(c) or, alternatively, under 28 U.S.C. § 1331 (1982) or 28 U.S.C. § 1337(a) (1982).[15] *See International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 696 (1963). This remedial approach would have been faithful to the district court's duty "to save and not to destroy" the remaining portions of the statute. *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality), quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

The district court below addressed none of these factors. It provided no explanation for its failure to apply the presumption favoring severability stemming from the severability clause in this statute, and also ignored the further presumption that a provision is severable "if what remains after severance 'is fully operative as a law.'" *INS v. Chadha*, 103 S. Ct. at 2775, quoting *Champlin Refining Co. v. Corporation Commission*, 286

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tration program. "Since registration is critical, this program must be made to work." S. REP. No. 334, 95th Cong., 1st Sess. 3 (1977).

[15] Section 1331 confers original jurisdiction on district courts in "all civil actions arising under the . . . laws . . . of the United States." Section 1337(a) similarly confers original jurisdiction on district courts in a "civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

U.S. 210, 234 (1932). Whether the proper remedy is to strike the arbitration provision and restore EPA's pre-existing duty to fix compensation awards or to strike the limitation on judicial review, the balance of the statute in either case is fully workable as a regulatory scheme. Accordingly, if this Court agrees with the district court that the compensation provision in § 3(c)(1)(D) is incompatible with Article III, the Court should modify the district court's injunction to preserve the unobjectionable portions of the statute.

IV. INVALIDATION OF THE FIFRA REGISTRATION SCHEME WILL THWART CONGRESS' GOAL OF PROMOTING COMPETITION IN THE SALE OF PESTICIDES AND ELIMINATING WASTEFUL DUPLICATION OF SCIENTIFIC TESTING

The 1978 version of the FIFRA registration scheme reflects the coalescing of four important public objectives. First, Congress established a regulatory mechanism intended to assure that only safe and effective pesticides are sold in interstate commerce. Second, by authorizing EPA to rely on data in its own files, Congress hoped to streamline the regulatory process, and thereby to eliminate waste and duplication of effort and to speed up the registration of pesticides. Third, by establishing a mechanism to compensate registrants whose data are used in approving follow-on registrations, Congress chose to spread the cost of assembling the data among all registrants that benefitted from the data. It thereby sought to minimize possible disincentives to innovation if initial registrants had to bear the entire cost of a registration application while potential competitors enjoyed a "free ride" on the initial registrant's costly studies. In addition, by assigning the resolution of compensation disputes to arbitrators instead of to courts or to EPA, Congress sought to minimize the burden of dispute resolution on the agency and the judiciary. Finally, to minimize barriers to market entry resulting from the data submission

requirements and thus promote competition, Congress reaffirmed the agency's right to use data in its files to approve follow-on applications for products the agency had already found to be safe and effective.[16]

The industry's evolution demonstrates that Congress designed a regulatory scheme tailored to achieve these goals. As Congress predicted, § 3(c)(1)(D) has removed unnecessary barriers to market entry created by the Act's data submission requirement and has facilitated the emergence of a competitive market environment. EPA still must examine each proposed pesticide product to confirm its safety and efficacy, but it no longer must ignore pertinent information in its own files. Similarly, registration applicants for follow-on products no longer must conduct years of costly studies to prove again and again what EPA already can determine from data in its files.

Most competition in this industry comes from follow-on products. For example, of approximately 60 companies that have a registration for a four pound per gallon methyl parathion product, at least 90% (including Drexel and Griffin) hold follow-on registrations. Similarly, of the dozen or so companies that market a three pound per gallon dinitro product, at least two-thirds (including Drexel) hold follow-on registrations.

The approval of a follow-on application can produce almost immediate economic benefits to farmers and the public in the form of reduced prices, often even before the follow-on product reaches the market. For instance, through 1983, the Diamond Shamrock Corporation, a multinational conglomerate with annual sales of over $3 billion, had been the only registrant of technical chlorothalonil, a fungicide used on most of the American pea-

[16] *See, e.g.*, S. REP. No. 334, 95th Cong., 1st Sess. 30-31 (1977); 123 CONG. REC. H11856 (daily ed. Oct. 31, 1977) (remarks of Rep. Foley); 123 CONG. REC. S13091, S13093-95 (daily ed. July 29, 1977) (remarks of Senator Leahy); 124 CONG. REC. S15303-04 (daily ed. Sept. 18, 1978) (remarks of Senator Leahy).

nut crop, on soybeans and on various vegetables. Diamond Shamrock had held patents on chlorothalonil and hence had faced no competition in the sale of the product.[17] Griffin obtained a registration for technical chlorothalonil in January 1983. Until that time, Diamond Shamrock's product sold for approximately $23 per gallon wholesale. However, since Griffin received its registration, Diamond Shamrock has dropped its price to under $20 per gallon—approaching the $15 per gallon price at which the product is offered in at least one foreign market. American farmers will save millions of dollars per year as a result of the more competitive price structure that has emerged for this product since Griffin positioned itself to enter this market.[18]

The price for atrazine, which is used on approximately 64 million acres of crops in this country, also has dropped since follow-on registrations have been issued. In 1976, before the patent held by Ciba-Geigy Corporation expired, the wholesale price of atrazine 4-L (a formulated product) was approximately $13 per gallon. Since then, at least eight follow-on registrations have been issued (including one each to Griffin and Drexel), and the price has dropped to below $7 per gallon. With about 40 million pounds of product used each year, this price reduction has yielded enormous cost savings for this country's farmers.

A price reduction also is likely in the domestic trifluralin market during 1985 when the patent held by an Eli Lilly & Company subsidiary expires. This pesticide is used in the United States primarily on cotton and soybeans and also is sold abroad. In the United States, trifluralin is sold to distributors for approximately $21 to $23 per gallon (assuming a formulation of four pounds

[17] EPA, Office of Pesticide Programs, *Agricultural Impact Analysis of Chlorothalonil* at 5 (Sept. 28, 1983).

[18] *Id.* at 9. As EPA recognizes, price decreases are likely when a pesticide company suddenly faces competition after having been "isolated . . . by patent or other similar protection." *Id.* at 7.

per gallon), while the price abroad, where multiple sellers compete with each other, is approximately half of the domestic price. Drexel already has received a trifluralin follow-on registration from EPA and expects to begin marketing its product in 1985 or 1986, after Eli Lilly's patent expires. Lilly already has dropped its domestic price over 15 percent from 1983-84 levels in anticipation of increased competition, and the price can be expected to drop further after Drexel and others enter the market. The impact of this decrease will be widespread. In 1982 alone, approximately 53 million pounds of trifluralin were produced in the United States.[19]

If the Court affirms the decision below and invalidates the follow-on scheme, there appears to be no question that many initial registrants will seek to cancel existing follow-on registrations. For example, as previously noted, Stauffer chemical has sought cancellation of PPG's follow-on registration of butylate in the post-arbitration litigation pending in the District of Columbia. *See* note 9 *supra*. Similarly, Eli Lilly has brought lawsuits against Drexel and other firms possessing "follow-on" trifluralin registrations seeking to have those registrations declared invalid. *See, e.g., Eli Lilly & Co. v. EPA*, No. IP831858C (S.D. Ind. filed Nov. 21, 1983). Plainly, there would be little incentive for initial registrants to agree to license their data to follow-on applicants—the only portion of the registration scheme not enjoined by the district court (J.S. App. 22a)—because the effect of doing so would undercut the initial registrant's dominance of the market and the resulting non-competitive price structure.

In the face of cancellations of existing follow-on registrations and the inability to obtain new ones, the only

[19] *See also* EPA, OFFICE OF RESEARCH & DEVELOPMENT, GUIDELINE FOR THE DISPOSAL OF SMALL QUANTITIES OF UNUSED PESTICIDES at 161, table C (1975) (the atrazine production volume in the United States in 1971 was 25 million pounds).

option available to firms wishing to compete vigorously with the initial registrants would be to duplicate the data already in EPA's files. This wasteful duplication would frustrate one of Congress' principal aims in enacting the 1978 amendments.[20] In any event, the option may be more theoretical than real because duplicating the data rarely would be economically feasible. Approximately half of Drexel's principal pesticide products, for example, have follow-on registrations issued since 1978. These include both technical and formulated, "end-use" products; if the company now were required to spend approximately $1.8 to $2.9 million per active ingredient to generate data to support only its technical registrations,[21] it could have to spend over $6 million, 20 percent of the company's annual sales volume.

Furthermore, Drexel expects to file between 15 and 20 applications for new follow-on registrations in the next several months and Griffin plans to file between 10 and 12. If EPA is enjoined from processing these applications by relying on previously submitted data, those companies' costs of data assembly could be prohibitive. Moreover, these companies' circumstances are hardly unique. In papers filed with this Court in the *Monsanto* case, EPA estimated that over the course of a year, applications for 1,700 to 2,200 new products will be precluded or delayed if implementation of the registration scheme is enjoined.[22]

[20] *See* S. REP. No. 334, 95th Cong., 1st Sess. 30-31 (1977).

[21] *See* note 2 *supra*. Indeed, EPA's estimates appear in many cases to be low. For example, to support their maneb registrations, Drexel and Griffin face an estimated cost of $4.6 million simply to produce additional data requested by EPA as part of its "data call-in program" pursuant to § 3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B). If each company were compelled to obtain a totally new registration and pay for all testing itself, it could have to pay this sum plus the $1.8 to $2.9 million data cost estimated by EPA.

[22] Affidavit of Edwin L. Johnson, Director, EPA Office of Pesticide Programs, submitted in support of EPA's Application for a

Furthermore, these are not tests that can be duplicated overnight; many are extremely time consuming, including some that will take as long as four years to complete.[23] This delay in obtaining registrations will handicap the smaller companies seeking to return to the market because of the substantial headstart gained by the few large firms that already have received registrations based on their own data. EPA has estimated that less than 25 percent of the anticipated registration applications for new agricultural pesticides or amendments thereto are likely to qualify for registration if the follow-on registration scheme were invalidated.[24]

Finally, sharp price increases are almost certain to follow a decision that results in the cancellation of existing follow-on registrations. This will occur in two ways. First, registrants who have submitted data, no longer facing competition from follow-on sellers, will be able to raise their prices with impunity.[25] Second, even if some of the small pesticide firms can afford to sponsor their own tests and eventually return to the market, the cost of market reentry will be substantially higher than at present, forcing them to set their own prices at significantly higher levels than they do today.

In sum, the sharp decline in competition that inevitably would follow invalidation of the 1978 amendments would

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Stay of Judgment of the United States District Court for the Eastern District of Missouri Pending Direct Appeal, July 1983, ¶ 6, *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315 (1983).

[23] *Id.* ¶ 5.

[24] *Id.* ¶ 6.

[25] For example, in today's market, over 40 million pounds of 2, 4-dichlorophenoxyacetic acid are applied annually on grain crops such as corn, wheat, barley, rye and oats, and some two dozen firms hold follow-on registrations. If these firms are forced out of the market because their follow-on registrations have been cancelled, the data submitters for those products will be free to raise their prices substantially.

affect not only the viability of most small pesticide companies, but also, in turn, would increase the costs of American farmers and the prices they charge for their products. Nothing in Article III compels such a calamitous result. To the contrary, Congress acted reasonably in enacting § 3(c)(1)(D) of FIFRA under its broad Commerce Clause authority to prevent such consequences, while at the same time assuring the original data submitter a fair and rapid mechanism for obtaining compensation without unduly burdening the courts or EPA.

CONCLUSION

The district court's judgment should be reversed and the case remanded to that court with directions to dismiss the complaint.

Respectfully submitted,

DAVID B. WEINBERG
WILLIAM R. WEISSMAN
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Attorneys for
Griffin Corporation and
Drexel Chemical Company

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(1)

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No. 84-497

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

REX E. LEE
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANNE S. ALMY
JACQUES B. GELIN
JOHN A. BRYSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GERALD H. YAMADA
Acting General Counsel

EDWARD C. GRAY
MARCIA E. MULKEY
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether a constitutional challenge to the data compensation and arbitration scheme of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136a(c)(1)(D)(ii), is justiciable when the plaintiffs fail to show an actual injury that would be redressed by the requested relief.

2. Whether, if we assume the issue is justiciable, FIFRA's data compensation and arbitration provisions violate Article III of the United States Constitution because the awards made by the arbitrators selected under the statute are subject to review by an Article III court only on a showing of "fraud, misrepresentation, or other misconduct." 7 U.S.C. 136a(c)(1)(D)(ii).

3. Whether, if we assume the issue is justiciable and these provisions violate Article III, the plaintiffs are entitled to a judgment invalidating the entire scheme for consideration of previously submitted data rather than a judgment striking the limitation on judicial review.

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: Abbott Laboratories, Ciba-Geigy Corporation, I.E. duPont De Nemours Company, FMC Corporation, Rhone-Poulenc, Inc., Rohm and Haas Company, Stauffer Chemical Corporation, Uniroyal, Inc., Velsicol Chemical Corporation and Zoecon Corporation. The following entities, originally parties to this action, were dismissed prior to final judgment: Ralston Purina Company, Salisbury Laboratories, Inc., Sandoz, Inc., Upjohn Company, and the National Agricultural Chemicals Association.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-497

LEE M. THOMAS, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

OPINION BELOW

The judgment and order (J.S. App. 1a-4a) of the district court is unreported. The prior opinion of the district court (J.S. App. 5a-20a) is reported at 571 F. Supp. 117.

JURISDICTION

The judgment of the district court (J.S. App. 21a-22a) was entered on August 7, 1984 and was amended (J.S. App. 1a-4a) on September 4, 1984. The Administrator of the Environmental Protection Agency filed a notice of appeal to this Court on September 6, 1984 (J.S. App. 23a-24a). The jurisdictional statement was filed on September 27, 1984,

and the Court noted probable jurisdiction on November 26, 1984 (J.S. 64). The jurisdiction of the Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution and the relevant portions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, are reprinted at J.S. App. 27a-31a.

STATEMENT

1. Following the remand and reconsideration ordered by this Court on July 2, 1984,[1] the court below has again declared unconstitutional a key provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, the federal legislation regulating the marketing and use of pesticides. This Court directed reconsideration in light of its decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984) (*Monsanto*), a case in which the Court reviewed and sustained the constitutionality of FIFRA's data licensing and disclosure provisions. Under the statute, persons seeking to market a pesticide product in the United States must first obtain a registration from the Environmental Protection Agency (EPA). 7 U.S.C. 136a(a). The Administrator bases his determination to grant a registration, in part, on test data submitted or cited by the application for registration, data that generally include information on the chemical nature and structure of the pesticide as well as test results on the potential dangers of the product. Section 3(c)(1)

[1] *Ruckelshaus* v. *Union Carbide Agricultural Products Co.*, No. 83-1564.

(D) of FIFRA permits EPA to consider certain categories of health and safety data submitted by one applicant in support of the application of another company. 7 U.S.C. 136a(c)(1)(D). That Section also provides that the latter applicant, in order to cite the data, must offer to compensate the original submitter; if the parties cannot agree on the amount of compensation, either may initiate binding arbitration proceedings.

Congress first required the registration of pesticides marketed in the United States in 1947,[2] in legislation that authorized the Secretary of Agriculture to set test data requirements for registration. Act of June 25, 1947, ch. 125, § 4(a), 61 Stat. 167.[3] It was not until 1972, however, that Congress addressed the question whether agency officials could consider data submitted by one registrant in reviewing a subsequent application by another person for the same pesticide. *Monsanto*, slip op. 2. After considerable debate, Congress amended the statute to authorize EPA to consider previously submitted data if the subsequent applicant offered to compensate the original data submitter and if the data were not protected from disclosure by Section 10(b) of the statute as "trade secrets." Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, §§ 3, 10(b), 86 Stat. 979-980, 989. See *Monsanto*, slip op. 3-4. The amount of compensation would be determined either through negotiation between the parties,

[2] Under prior statutes, dating back to 1910, it was unlawful to manufacture and sell insecticides that were adulterated or misbranded, but there was no premarketing registration mechanism. Insecticide Act, 1910, ch. 191, 36 Stat. 331 *et seq.*

[3] In 1970, the responsibility for administering FIFRA was transferred to the new Environmental Protection Agency. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

or, if that failed, by an EPA order that was subject to judicial review. Pub. L. No. 92-516, § 3, 86 Stat. 980. Congress's two purposes in enacting these provisions were to encourage market entry by competitors who otherwise might be discouraged by the high costs of producing health and safety data, and at the same time, to preserve incentives for companies to engage in the required research. See S. Rep. 92-838, 92d Cong., 2d Sess. 6 (1972); S. Rep. 92-970, 92 Cong., 2d Sess. 12 (1972); S. Rep. 92-838, 92d Cong., 2d Sess. Pt. II 21, 69, 71-73 (1972).

The 1972 Amendments failed to define "trade secrets" and failed to resolve the status of data EPA had already received. The latter question was settled in 1975 when Congress limited the data licensing scheme to data submitted on or after January 1, 1970. Pub. L. No. 94-140, § 12, 89 Stat. 755. The definition of "trade secrets" was left to the EPA Administrator and the courts. It developed, however, that several lower court decisions prevented EPA from considering much previously submitted data when reviewing subsequent applications. *Monsanto*, slip op. 5; S. Rep. 95-334, 95th Cong., 1st Sess. 3, 7 (1977); H.R. Rep. 95-663, 95th Cong., 1st Sess. 18 (1977). In part because of such "trade secret" controversies, "the process of registering new pesticides simply ground to a halt." *Chevron Chemical Co.* v. *Costle*, 499 F. Supp. 732 (D. Del. 1980), aff'd on other grounds, 641 F.2d 104, 111 (3d Cir.), cert. denied, 452 U.S. 961 (1981). Consequently, in 1978, Congress again amended the statute in an effort to remove the barriers to competitors seeking to enter the market for previously registered products. S. Rep. 95-334, *supra*, at 8, 30-31.

In the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 *et seq.* (1978 Amendments), Congress abolished the 1972 prohibition on agency consideration of "trade secret" data because it had operated to discourage small potential competitors from entering the market by requiring them to duplicate health and safety tests for products similar to those already registered. Congress was concerned that FIFRA, in practice, acted as a de facto extension of patents beyond the statutory period of protection. See, *e.g.*, S. Rep. 95-334, *supra*, at 8, 30-31.

In order to promote competition and eliminate needless duplicative testing, Congress revamped the registration scheme. The costs of developing testing data are now spread among beneficiaries of the data; at the same time, innovation incentives are provided by exclusive use and compensation provisions that are independent of whatever protections a company may have under the patent law. S. Rep. 95-334, *supra*, at 30-31. Under the 1978 Amendments, applicants are granted a ten-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i), 7 U.S.C. 136a(c)(1)(D)(i). All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years following the original submission, if the applicant offers to compensate the original submitter. § 3(c)(1)(D)(ii), 7 U.S.C. 136a(c)(1)(D)(ii). Data that do not qualify for either the ten-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. § 3(c)(1)(D)(iii), 7 U.S.C. 136a(c)(1)(D)(iii).[4]

[4] These provisions operate independently of the patent laws, so chemicals or products that are patented by the original data submitter may not be copied for 17 years (35 U.S.C. 154).

Congress also modified the compensation provisions, significantly changing EPA's role. Unlike the prior statutory regimen, in which EPA decided the amount and terms of compensation when the data submitter and the subsequent applicant could not agree, the revised statute provides that either party may initiate arbitration proceedings by asking the Federal Mediation and Conciliation Service to designate an arbitrator. § 3(c)(1)(D)(ii), 7 U.S.C. 136a (c)(1)(D)(ii). The statute further provides that the "findings and determination of the arbitrator shall be final and conclusive" and not subject to judicial review "except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator" (*ibid.*).[5]

2. Several large pesticide firms brought this action in 1976 in the United States District Court for the Southern District of New York, challenging the constitutionality of the disclosure provisions of FIFRA, as amended in 1972 and 1975. Following the 1978 Amendments, appellees amended their complaint to allege that both the data consideration and data disclosure provisions took their property in violation of the Fifth Amendment and deprived them of their property without due process of law (Plaintiffs' Fourth Amended Complaint, filed Nov. 20, 1978). The district court granted appellees' motion for a preliminary injunction with respect to all data submitted

[5] Section 3(c)(1)(D)(ii) also provides for sanctions against parties who do not cooperate with the arbitration scheme. If an applicant fails to comply with the terms of a compensation agreement or an arbitration award, its registration is subject to cancellation; if a data submitter fails to participate or otherwise comply, it forfeits its right to compensation (7 U.S.C. 136a(c)(1)(D)(ii)).

prior to the enactment of the 1978 Amendments. *Amchem Products, Inc.* v. *Costle*, 481 F. Supp. 195 (S.D.N.Y. 1979). The Second Circuit reversed, however, concluding that plaintiffs had failed to show a likelihood of success on the merits, and this Court denied a petition for a writ of certiorari. *Union Carbide Agricultural Products Co.* v. *Costle*, 632 F.2d 1014 (1980), cert. denied, 450 U.S. 996 (1981).

Following that round of litigation, appellees stipulated to dismissal with prejudice of their taking claims and their due process claims as to the data consideration provisions (Stipulation and Order, filed Sept. 3, 1981). Thus, two contentions remained: (1) that the disclosure provisions, as applied to data submitted prior to 1978, violated due process, and (2) that the arbitration and compensation provisions were an unconstitutional delegation of legislative authority. After this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), appellees also maintained that the arbitration and compensation scheme violated Article III of the United States Constitution because the statute impermissibly assigned judicial functions to the arbitrators and limited judicial review (Supplemental Memorandum of Plaintiffs in Support of Motion for Summary Judgment, filed Mar. 3, 1983).

The district court granted appellees' motion for summary judgment on their Article III claim (J.S. App. 5a-20a).[6] The court first rejected the government's contention that any challenge to the compensation and arbitration scheme was not ripe for review

[6] The court also rejected appellees' due process claim against the retroactive application of the disclosure provisions and did not reach the claim of unconstitutional delegation of legislative authority (J.S. App. 14a, 19a).

until a party had suffered concrete injury from the results of a specific arbitration (J.S. App. 15a-16a n.2). In the court's view there was no "profit" in delaying resolution of the issue; the mere "statutory compulsion to seek relief through arbitration" was sufficient to create a concrete case or controversy (*id.* at 16a n.2). On the merits, the court concluded that the arbitration scheme is an "impermissible intrusion on the judiciary" (J.S. App. 19a), relying on this Court's decision in *Northern Pipeline*. Because the statute barred Article III courts from reviewing the arbitrator's decision except in instances of "fraud, misrepresentation, or other misconduct," there was, in the court's view, an "absolute assignment of power" to the arbitrators that violated Article III (J.S. App. 19a).

On the basis of this holding, the district court entered a broad injunction (J.S. App. 25a-26a). Rather than striking down only the limitation on judicial review of the arbitrators' decision, the court declared the entire compensation and arbitration scheme unconstitutional (J.S. App. 25a). Further, the court enjoined the Administrator from "permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)," *i.e.*, during the 15-year period following submission of the data, save when the original data submitter consents to the use of such data (J.S. App. 26a).

3. The government took a direct appeal to this Court (No. 83-1564) pursuant to 28 U.S.C. 1252 and urged the Court to dispose of the case in accordance with the anticipated decision in *Monsanto*, where the same issues were presented. 83-1564 J.S. 6-13. In *Monsanto*, the district court had declared that the data licensing and disclosure provisions were an unconstitutional taking of property and enjoined their implementation. The court also had held the arbitration and compensation scheme invalid as a violation of Article III. *Monsanto*, slip op. 11. This Court vacated the district court's judgment and sustained the constitutionality of the statute. The Court held that there was no taking as to data submitted prior to October 22, 1972, and after September 30, 1978, but that under certain circumstances, firms that submitted data between those two dates may have a claim for just compensation. *Id.* at 17-25. The Court further held that the district court erred in enjoining implementation of the statute because the Tucker Act, 28 U.S.C. 1491, was available to satisfy any claim for just compensation. *Monsanto*, slip op. 27-30.[7] In addition, the Court concluded that Monsanto's Article III claim was not ripe for review since "Monsanto did not allege or establish that it had been injured by actual arbitration under the statute." *Id.* at 31.

4. The Court then vacated the judgment in the present case and remanded for reconsideration in light of *Monsanto*. Order of July 2, 1984 (No. 83-1564). On remand, appellees amended their complaint and filed motions for reentry of judgment and for a preliminary injunction (J.A. 20-24, 26-31). The amended complaint alleged that one of the appellees, Stauffer Chemical Company, had submitted data to EPA in support of registrations for pesticides containing butylate, that EPA had considered these data without Stauffer's consent in granting a registration application filed by PPG Industries, Inc., for a pesticide containing the same active ingredient, and

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[7] The Court held, however, that a data submitter must first seek satisfaction through the arbitration procedure prescribed by the statute. *Monsanto*, slip op. 29.

that Stauffer had invoked the arbitration provisions of FIFRA against PPG (J.A. 23). Further, the complaint stated that the arbitration panel made an award on June 28, 1983, and that the award was less than Stauffer had demanded (*ibid.*). The amended complaint, however, did not request that the arbitration award be set aside or allege any legal defect in the award, other than the previous claim that the procedure for reaching the award was unconstitutional (J.A. 24).[8] As in the previous complaint, the only requested relief was prospective, *i.e.*, that the statutory provisions be declared unconstitutional and that EPA be enjoined from implementing the data licensing scheme under which compensation could be determined by arbitration (*ibid.*).

Following a hearing, the district court reinstated its judgment. The court concluded that "under the amended complaint the issue [was] ripe as to data submitted by plaintiff Stauffer Chemical Company post-1978 as to which there has been an award by an arbitrator" and that there was no basis for changing its earlier decision (J.S. App. 21a). The judg-

[8] In fact, the award is being attacked in a separate action filed, not by Stauffer, but by PPG (which is not a party to the instant case). *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, Civil Action No. 83-1941 (D.D.C. filed July 7, 1983). PPG's complaint asks that the award be set aside as excessive because the arbitrators awarded Stauffer not only a share of the data development costs but also compensation based on PPG's product sales. PPG also claims that Section 3(c)(1)(D) is unconstitutional under the Due Process Clause, the Taking Clause and Article III. Stauffer has not challenged the award as inadequate; indeed, it has counterclaimed for enforcement of the award. In the alternative, Stauffer has cross-claimed against EPA for a declaration that the statute violates Article III and counterclaimed against PPG for cancellation of PPG's registration and for damages in the amount of the award in the event the statutory compensation scheme is invalidated.

ment, as before, declares the compensation scheme unconstitutional as a violation of Article III and enjoins EPA from permitting or implementing any use of data subject to the compensation scheme except where the data submitter consents to such use (J.S. App. 21a). As a result, the provision for mandatory data licensing is invalidated, and the injunction, if allowed to take effect,[9] would create a right to exclusive use of data submitted after 1969 by all pesticide registration applicants.

SUMMARY OF ARGUMENT

1. Following this Court's remand for reconsideration in light of the decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), the district court reentered its injunction striking down the mandatory data licensing and arbitration provisions of FIFRA. Appellees' challenge to the statute, however, does not present a justiciable case or controversy. The district court erroneously concluded that Article III's requirement of a live controversy was satisfied because one of the appellees, Stauffer Chemical Company, had received an arbitration award in an amount less than it had claimed. The district court ignored the consistent line of this Court's cases that has required plaintiffs to demonstrate that the injury alleged will be redressed by the requested relief. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 13; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-73 (1978); *Simon* v. *Eastern Kentucky Welfare*

[9] On October 9, 1984, this Court stayed the judgment pending disposition of this appeal. No. A-178.

Rights Organization, 426 U.S. 26, 38 (1976). This requirement was not satisfied here. Stauffer did not ask the court below to set aside the award or to grant it the greater amount it had sought in the arbitration. In short, Stauffer did not request the only relief that could possibly redress the injury upon which it asserts standing to bring this action.

Since appellees seek no relief from a past arbitration, there is no showing of a threat of a real and immediate injury sufficient to satisfy Article III. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-107 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969). The fact that Stauffer participated in one such proceeding does not create a sufficient likelihood that that event will occur again. Because the complaint seeks only prospective relief Stauffer is in no different position than that of any of the other appellees who failed to allege even that they had been parties to an arbitration proceeding. The Court's recent decision in *Monsanto* precludes any challenge by such plaintiffs.

2. Even if this case were justiciable, the Article III claim would have to be rejected on its merits. The district court mistakenly relied for its judgment on this Court's recent decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In fact, however, *Northern Pipeline* expressly states that when Congress creates a statutory right, it may establish "particularized tribunals * * * to perform the specialized adjudicative tasks related to that right." 458 U.S. at 83. In FIFRA, Congress has done precisely that.

The common ground of the Justices concurring in the Court's judgment in *Northern Pipeline* was that Congress could not vest an Article I court with the

adjudication of traditional common law rights that arose entirely under state law. 458 U.S. at 91. In sharp contrast, data compensation disputes under FIFRA were unknown to the common law and are wholly a matter of recently created federal statutory rights. *Northern Pipeline*, accordingly, neither compels nor supports the district court's decision.

FIFRA's pesticide registration program was the result of Congress's effort to promote public health and to facilitate competition (while providing certain entitlements for innovators). The statute thus creates relationships between original registrants and me-too applicants that would not otherwise exist. Specifically, there would be no entitlement to compensation from subsequent applicants for the same or similar pesticide unless FIFRA so provided. When the operation of the registration scheme is properly understood—and the limited role of the arbitration procedure is placed in context—it is clear that Congress has merely created a remedy to "vindicate [the] statutory right to obtain compensation" in specified circumstances, as this Court stated in *Monsanto*, slip op. 31. Congress plainly possesses the authority to do so.

3. Finally, even if the district court had been correct in finding a violation of Article III, no justification would exist for the injunction it entered. The court's order in effect strikes down the entire data licensing scheme. But, since there could be no doubt under *Monsanto* that the scheme would be constitutional if sufficient Article III judicial review were available, the only appropriate relief would be to strike the statute's limitation on review. FIFRA's severability clause, 7 U.S.C. 136x, provides that the invalidation of any provision of the statute is to have

no effect on other provisions. Moreover, this Court has held that any statutory provision is presumptively severable if the remaining portions of the statute are fully operative as a law. *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 13. The legislative history gives no indication that Congress would have abandoned the entire data licensing scheme if it had known that compensation disputes would have to be resolved in judicial proceedings. Accordingly, the district court failed in its duty to save and not to destroy the remainder of the statute.

ARGUMENT

I. THE CONSTITUTIONAL CHALLENGE TO FIFRA'S COMPENSATION AND ARBITRATION SCHEME PRESENTED IN THIS LAWSUIT DOES NOT CREATE A JUSTICIABLE CASE OR CONTROVERSY

When last confronted with the identical claim that FIFRA's arbitration and compensation scheme is unconstitutional as a violation of Article III, this Court ruled that the plaintiff in that case, Monsanto, had not presented a ripe claim because it had neither alleged nor established any injury by an actual arbitration under the statute. *Monsanto*, slip op. 31. On remand for reconsideration in light of *Monsanto*, the district court in the present case concluded that Stauffer's claim was ripe because that company was "aggrieved by EPA's use of its data, by the compulsion to resort to an unconstitutional arbitration process * * * and by the arbitration award it had received * * *" (J.S. App. 3a-4a). These allegations and findings are not sufficient to satisfy the requirements of Article III.

A. Article III does not grant to the federal courts a roving commission to determine the constitutionality of every congressional enactment; rather it grants a power that is legitimately exercised "'only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & G.T. Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). "[T]he 'case or controversy' requirement defines with respect to the Judicial branch the idea of separation of powers on which the Federal Government is founded," *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12; *Valley Forge*, 454 U.S. at 473-474, and "'assure[s] that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

To satisfy Article III, the appellees must show, at a minimum, that they have suffered (or are threatened with) an actual injury fairly traceable to the challenged conduct of the defendant and that the requested relief is likely to redress the claimed injury. *Allen* v. *Wright*, slip op. 13, 15 n.19 (Brennan, J., dissenting); *Valley Forge*, 454 U.S. at 472; *Duke Power Co.*, 438 U.S. at 72-74, 81; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). Moreover, the claimed injury must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. at 501, and not merely abstract or conjectural. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969).

The principal error committed by the district court was its failure to require that the requested relief redress the claimed injury. In effect, the district court treated the allegation that Stauffer had been a party to an arbitration as a "free pass" to litigate in the federal courts even though it was conceded that the arbitration was unrelated to any request for relief.[10] Appellees allege merely that one of them—Stauffer—had been awarded less than the amount claimed.[11] This may well have established a basis for a showing of concrete injury to Stauffer. Had Stauffer filed an action in which it sought to remedy the perceived shortfall in its award, it might then have standing and a justiciable claim.

But that is not this case. Indeed, far from seeking to augment its arbitration award, Stauffer has at every opportunity sought merely to preserve that award unchanged. Completely absent from the forms of relief requested by the complaint, or granted by the district court, is any remedy that would alter the arbitrators' decision. In the terminology of Article III analysis, Stauffer seeks no remedy that would redress its perceived injury. The complaint requests a

[10] Appellees informed the district court that they "do not challenge the result of any arbitration, nor does the adjudication of [appellees'] claim depend in any manner on the outcome of an arbitration." J.A. 30.

[11] The arbitrators awarded Stauffer $1,465,000 (one-half of its testing costs), plus "running compensation" for every pound of butylate sold by PPG from 1983 through 1992 (at an adjustable rate approximating 15 cents per pound). J.A. 52, 54. Thus, Stauffer was awarded far more than a division of its test costs even though its original claim exceeded the award. J.A. 23.

declaration that the statutory provisions are unconstitutional and an injunction barring the future implementation of the data licensing scheme when the determination of compensation is subject to the arbitration provision (J.A. 24). Most tellingly, in the pending action brought by PPG for review of the award, see note 8, *supra*, Stauffer has counterclaimed for *enforcement* of that very arbitration award and, in the alternative, has counterclaimed for damages from PPG *in the amount of the arbitration award* in the event the statutory compensation scheme is invalidated.

No matter how "aggrieved" Stauffer may purport to be in some abstract sense, it has neither suffered nor sought to remedy a concrete injury of the sort Article III requires. Indeed, the subsequent actions of the parties to the Stauffer-PPG arbitration clearly show that Stauffer prevailed for all practical purposes. Stauffer has resisted PPG's efforts to overturn the arbitrators' decision, and it steadfastly has chosen not to pursue any remedies that would rectify any wrongs it claims to have suffered—such as seeking to have the award set aside in favor of a judicial resolution of Stauffer's claim against PPG.[12] Accordingly, Stauffer has not " 'alleged such a personal stake in the outcome of the controversy' " as to justify the invocation of the federal judicial power on its behalf. *Simon* v. *Eastern Kentucky Welfare*

[12] In the absence of such an effort, Stauffer's complaint amounts merely to an allegation that the Constitution has been violated. As in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, *supra*, it is Stauffer's burden "to identify any personal injury suffered by [it] *as a consequence* of the alleged constitutional error * * *." 454 U.S. at 485 (emphasis in original).

Rights Organization, 426 U.S. at 38 (quoting *Warth* v. *Seldin*, 422 U.S. at 498-499).[13]

B. Because appellees seek prospective relief only, relating solely to potential future arbitrations, they are in no better position than was the plaintiff in *Monsanto*.[14] This Court there held (slip op. 31) that there was no justiciable controversy over the constitutionality of the arbitration provision. The fact that Stauffer went through the arbitration process once does not increase the likelihood that that event will occur again; consequently, that fact does not create a real and immediate threat of injury sufficient to confer standing on Stauffer. *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-107; *O'Shea* v. *Littleton*, 414 U.S. at 488, 495-496; *Golden* v. *Zwickler*, 394 U.S. at 109.

II. THE ASSIGNMENT OF THE RESOLUTION OF DATA COMPENSATION DISPUTES TO ARBITRATION WITH LIMITED JUDICIAL REVIEW DOES NOT OFFEND THE CONSTITUTIONAL REQUIREMENTS OF ARTICLE III

The district court, relying on this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, held that the mandatory arbi-

[13] As this Court stated in *Monsanto*, "[t]he operation of the arbitration procedure affects *only* [the data submitter's] ability to vindicate its statutory right to obtain compensation from a subsequent applicant." Slip op. 31 (emphasis added).

[14] Of course, the appellees other than Stauffer are in precisely the same position as Monsanto and as in *Monsanto*, their challenge should not be permitted to proceed. Those appellees have not become entitled to any compensation and have not engaged in arbitration. *Monsanto*, slip op. 31. See *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 304-305 (1979); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967).

tration provisions of FIFRA were "an impermissible intrusion on the judiciary" because the "system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters" (J.S. App. 19a-20a). This result rests on a misinterpretation of the holding in *Northern Pipeline* and on a misapprehension of the limits on Congress's authority to create statutory entitlements and to prescribe the procedures for their implementation—procedures which effectively serve as part of the definition of the statutory entitlement conferred.

Where such a procedure has been deemed to promote legislative objectives, the states and Congress have frequently provided for final and binding arbitration of various kinds of disputes. This Court has upheld such laws against due process challenges. *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U.S. 151, 157-158 (1931) (state statute mandating arbitration of the amount of loss under insurance policy). See *Crane* v. *Hahlo*, 258 U.S. 142 (1922) (damage awards for municipal construction work reviewable only for jurisdictional defects, fraud, or willful misconduct). See also *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123 (3d Cir. 1969); *Edwards* v. *St. Louis-S.F.R.R.*, 361 F.2d 946 (7th Cir. 1966). The question in this case is whether Article III bars Congress's decision to use this arbitration process in resolving data compensation disputes under FIFRA. We submit it does not.

A. The Decision In *Northern Pipeline Co.* v. *Marathon Pipe Line Co.* Does Not Support The District Court's Decision

In *Northern Pipeline*, the Court faced a challenge to the jurisdictional provisions of the Bankruptcy Act of 1978, 11 U.S.C. 101 *et seq.* Prior to 1978, federal district courts served as bankruptcy courts but proceedings in bankruptcy cases generally were held before bankruptcy referees appointed by the district court, unless the district court chose to withdraw the case from the referee. See Bankruptcy Rule 102. Bankruptcy courts were vested with "summary jurisdiction," which extended to controversies involving property in the actual or constructive possession of the court; they did not, however, have "plenary" jurisdiction over disputes involving property in the possession of a third person, except by consent. See *Northern Pipeline*, 458 U.S. at 53.

The 1978 Bankruptcy Act abolished the referee system and established in each district a new United States Bankruptcy Court. 28 U.S.C. 151(a). The judges of the new bankruptcy courts were to be appointed for limited terms by the President, with the advice and consent of the Senate; the judges were also subject to removal by the Judicial Council of the circuit for incompetence, misconduct or disability. 28 U.S.C. 152 and 153.

The 1978 Act also eliminated the distinction between summary and plenary jurisdiction; the statute vested the bankruptcy courts with jurisdiction "of all civil proceedings arising under Title 11 [the Bankruptcy Title] or arising in or related to cases under Title 11." 28 U.S.C. 1471(b) and (c). The *Northern Pipeline* case arose when that company filed a reorganization petition in the United States Bankruptcy Court for the District of Minnesota. 458 U.S.

at 56. Subsequently, Northern Pipeline filed a breach of contract action under state law against Marathon Pipeline Company in the bankruptcy court. *Ibid.* Marathon contested the jurisdiction of the bankruptcy court to adjudicate the state law claim, contending that Article III required that the tribunal resolving this claim consist of judges who had life tenure and protection against salary diminution. 458 U.S. at 56-57. The district court granted Marathon's motion to dismiss and this Court affirmed. *Id.* at 57, 88.

The vice of the 1978 Act was the assignment to the bankruptcy courts of the authority to adjudicate traditional common law rights (458 U.S. at 81-86).[13] The Court did not suggest that the same result would obtain in the situation presented by a mechanism for implementing statutorily-created rights of recent vintage, such as in the situation presented by FIFRA. Indeed, the plurality in *Northern Pipeline* reaffirmed Congress's authority to proceed in this manner (*id.* at 83 (footnote omitted)):

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right

[13] The plurality opinion in *Northern Pipeline* employed a restrictive analysis of the constitutional power of Congress to create legislative courts to adjudicate such rights (458 U.S. at 63-76). In the plurality's view, the Court's prior cases had confined to three the exceptions for this purpose from the requirements of Article III: (1) courts for the territories of the United States and the District of Columbia, (2) courts-martial and (3) cases involving "public rights." *Id.* at 64-70. Adjudication of the state-created right to recover contract damages at issue in *Northern Pipeline* did not fall into any of these three exceptions. *Id.* at 71.

> must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

This statement clearly removes from FIFRA any Article III cloud.[16]

In a separate opinion concurring in the judgment only, Justice Rehnquist, joined by Justice O'Connor, did not endorse the plurality's analysis (see note 15, *supra*), stating that the "confusing precedents" were not subject to "easy synthesis." 458 U.S. at 90-91. In Justice Rehnquist's view, it was sufficient that no case had gone so far as to permit Congress to assign to a non-Article III forum the adjudication of a traditional action at common law that arose entirely under state law. 458 U.S. at 90-91.

The *Northern Pipeline* holding is therefore limited to the proposition that traditional common law rights arising entirely under state law may be adjudicated in the federal system only by Article III courts or in an adjunct system that preserves the essential attributes of judicial power in an Article III court. See 458 U.S. at 92 (Burger, C.J., dissenting). The case at bar does not involve traditional common law rights at all, let alone such rights arising entirely under state law. Under FIFRA, the arbitrator determines the amount of compensation due a data submitter, the entitlement to which is created solely by the congressionally-mandated data licensing scheme for registering pesticides. *Monsanto*, slip op. 31. The decision in *Northern Pipeline*, therefore, does not

[16] The plurality also rejected the contention that Article III was satisfied because the bankruptcy courts were merely adjuncts of the district courts. 458 U.S. at 76-87. See also *id.* at 91 (Rehnquist, J., concurring in the judgment).

support invalidation of FIFRA's arbitration provisions.

B. The Entitlement To Compensation Under FIFRA Is Wholly A Statutory Creation

This Court stated in *Monsanto* (slip op. 31) that the arbitration procedure "affects only Monsanto's ability to vindicate its statutory right to obtain compensation from a subsequent application whose registration application relies on data originally submitted by Monsanto * * *." That correct statement of the role of FIFRA's arbitration procedure distinguishes this case from *Northern Pipeline*. In the absence of FIFRA, the right to compensation would not exist; nor for that matter would the relationships that give rise to that right.

If FIFRA were repealed, companies would be free to market pesticides without any premarket review; no registration would be necessary. Competitors would be free to market copies of appellees' unpatented end-products, without any necessity of duplicating appellees' testing (if any were performed).[17] These competitors would simply enter the market and appellees would be entitled to no compensation—no sharing of the costs of testing. And, hypothetically, instead of enacting FIFRA, Congress could have required registration, supported by testing data, only of new pesticide products, which (if unpatented) could then freely be copied by other manufacturers.[18]

[17] Rights under the patent law are, of course, unaffected by FIFRA.

[18] This is the method of accommodating interests in public health, innovation, and competition in the Food and Drug Administration's approval systems for food additives and color additives. These call for premarketing submissions only by the pioneer company; competitors need obtain no approvals before marketing copies of an approved product (21 U.S.C.

Again, there would be no compensation of the sort to which FIFRA creates an entitlement.

On the other hand, Congress could have established a scheme that barred EPA from considering previously submitted data, thus requiring each applicant for registration to submit its own data. As the legislative history demonstrates, Congress eschewed any of these extreme alternatives in fashioning a workable registration system that protects the public health (by requiring submission of data that will enable EPA to determine that a pesticide will not cause "unreasonable adverse effects on the environment," § 3(c)(5)(D), 7 U.S.C. 136a(c)(5)(D)), and promotes competition (by enabling competitors to market copies of unpatented pesticide products more quickly by avoiding duplication of testing data). At the same time, it provides for a sharing by subsequent applicants relying on the original registrant's test data of the cost of generating those data. FIFRA's legislative history shows that the compromise reflected in the data consideration and compensation provisions was the result of a careful weighing of burdens and benefits.

As this Court noted in *Monsanto*, slip op. 26, Congress enacted the data licensing and compensation scheme to alleviate the anticompetitive effects of FIFRA's data requirements. After much debate, Congress decided to encourage competitors to enter the market by permitting EPA to grant "me-too" registrations on the basis of data submitted by another firm manufacturing the same or similar pesti-

348(a)(2), 376(a)(1)). And, "[a]ll safety and functionality data and information submitted" by the pioneer company are "available for public disclosure" (21 C.F.R. 71.15, 171.1(h)).

cide. See S. Rep. 92-970, *supra*, at 12; S. Rep. 92-838, *supra*, Pt. II at 69, 71-73. But Congress also wanted to encourage research and development, and concluded that compensation for the use of test data was an appropriate incentive for innovation. See S. Rep. 92-838, *supra*, Pt. II at 71-73.[19]

Since Congress decided to require mandatory data licensing and grant compensation for this use of a company's research data, Congress also had to decide how the compensation would be determined if the parties could not reach agreement. In the 1972 Amendments, Congress placed EPA in the role of the initial arbiter, and provided for on-the-record administrative proceedings. 86 Stat. 980. The right to appeal to the courts was limited, since only the data submitter could seek review and the court could not reduce the amount of compensation awarded in the administrative proceedings. *Ibid.* Difficulties arose, however, in the implementation of this scheme, principally because of uncertainty whether "trade secret" data and data submitted prior to 1972 were subject to the compensation requirements. See S. Rep. 94-452, 94th Cong., 1st Sess. 10-11, 15 (1975). In addition, the delay in determining compensation had apparently slowed the registration process. The 1975 Amendments set a cut-off date of January 1, 1970, and also provided that "[r]egistration shall not be delayed pending the determination of reasonable compensation between the applicants, by the Administrator or by the court." 89 Stat. 755.[20]

[19] The compensation provision was also viewed as a fair way to spread the costs of data development. S. Rep. 92-838, *supra*, Pt. II at 69.

[20] The 1975 Amendments also permitted both parties to seek judicial review. 89 Stat. 755.

As this Court noted in *Monsanto*, by 1978 Congress found that the registration process was mired in a complex set of controversies about data protection, "trade secrets," and compensation rights. See *Monsanto*, slip op. 4-5; H.R. Rep. 95-663, 95th Cong., 1st Sess. 18, 21, 41-42, 53, 58-59 (1977); S. Rep. 95-334, 95th Cong., 1st Sess. 3, 7, 30-31 (1977). Specifically, Congress was concerned that the court's broad reading of the "trade secret" provisions had exempted a large volume of data from the licensing scheme and had discouraged market entry. In addition, Congress was informed that the structure of the data compensation procedure had also contributed to the frustration of the statute's purposes. The Administrator of EPA told the House Committee on Agriculture that potential market entrants "object to signing a 'blank check' for use of data—that an offer to pay reasonable compensation without knowing what that means in terms of dollars and cents is unpalatable from a business point of view." H.R. Rep. 95-663, *supra*, at 59. The Administrator also told Congress that determination of the appropriate amount of compensation was outside the agency's area of expertise (*ibid.*).[21]

The Senate Committee on Agriculture, Nutrition and Forestry concluded that the data licensing and compensation scheme was "essential to the registration process" but that "administration of this [scheme had] been plagued with problems." S. Rep. 95-334, *supra*, at 7. In part, the Committee sought to solve those problems by relieving EPA of the burden of adjudicating compensation disputes and by establishing a system of binding arbitration. S. Rep. 95-334, *supra*, at 8.[22] To address these urgent concerns identified by Congress, the 1978 Amendments imposed the requirement of binding arbitration of data compensation disputes by arbitrators supplied by the Federal Mediation and Conciliation Service; the amendments also provided for judicial review in instances of "fraud, misrepresentation, or other misconduct." 7 U.S.C. 136a(c)(1)(D)(ii).

The history of Congress's effort to devise an efficient and workable pesticide registration system shows that in 1978 the need to simplify and expedite that process was acute. Among the important issues facing Congress was the creation of a mechanism for resolving compensation disputes. It is evident that the resolution of such disputes presented only narrow questions peculiar to the economics of conducting research on the environmental and health effects of pesticides. Congress correctly perceived that prompt resolution of these disputes was an important factor in facilitating the registration of the products of potential competitors. Congress also concluded that burdening EPA with the initial determination was a hindrance to expeditious settlement of these claims. The legislative decision to satisfy the particularized need in this specialized area by selecting binding arbitration, a dispute resolution measure common in the commercial world, was plainly justified by the situation existing at the time of the 1978 Amendments.

C. Congress Acted Within Its Constitutional Powers In Creating A Remedy For Vindicating A Statutorily Created Entitlement

As we have described, Congress has established certain economic relations between competing pro-

[21] The agency supported the substitution of binding arbitration for the additional reason that it "advanced the probability that data originators will be promptly compensated." H.R. Rep. 95-663, *supra*, at 53.

[22] The Committee also noted that the reforms it proposed would reduce the need for "lengthy data compensation claims." S. Rep. 95-334, *supra*, at 31.

ducers of pesticide products, in an exercise of its constitutional authority to regulate interstate commerce. In the interest of safeguarding the public health while promoting competition and thus benefitting the public at large, Congress has imposed restrictions (that would not otherwise exist) on the ability of competitors to market unpatented pesticide products, but has limited those restrictions by also imposing a form of mandatory data licensing on certain pesticide registrants. Concomitantly, Congress granted subsequent applicants for registrations the right to rely on previously-submitted data *if they pay the statutory price.*[23] That statutory price defines the limit of the first registrant's wholly statutory right to exclude competitors from marketing an unpatented product. There could hardly be a clearer example of the exercise of Congress's constitutional "discretion," in "creat[ing] a statutory right," to "prescribe remedies" and "provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks

[23] The right to rely on data submitted by others is further limited. It does not, of course, afford a right to market a product in violation of a patent. In addition, original applicants are granted a ten-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i), 7 U.S.C. 136a(c)(1)(D)(i). See *Monsanto*, slip op. 5. Even in these limited circumstances where previously submitted data may be relied upon without the original applicant's consent, the arbitration process is triggered only when the original registrant and follow-on applicant are unable to agree on the amount of compensation. Only one arbitration has been concluded since FIFRA was amended in 1978.

related to that right." *Northern Pipeline*, 458 U.S. at 83 (plurality opinion).[24]

III. EVEN IF THE ARBITRATION PROVISIONS OF FIFRA VIOLATE ARTICLE III, THE COURT BELOW ERRED IN ITS CHOICE OF RELIEF

Although the only constitutional defect the district court found was the absence of more comprehensive judicial review of arbitration awards, it enjoined the EPA Administrator from implementing the entire data licensing system. The district court order gives data submitters the right to prohibit use of their data during the 15-year period following submission to EPA—exactly the opposite of what Congress intended. This wholesale revision of the congressionally-devised scheme is not only unjustified by the perceived constitutional deficiency but is also directly contrary to FIFRA's express severability provisions.

[24] In *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Court reviewed the worker's compensation scheme created by the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424. That statute created an administrative and judicial system for the compensation of private employees injured while working on the navigable waters of the United States. 285 U.S. at 37-38. The Court concluded that the adjudication of the compensation liability of a private employer to one of its employees was purely a matter of private rights, and therefore subject to the limitations of Article III.

The situation presented here, however, bears only the most superficial resemblance to the circumstances of *Crowell* v. *Benson, supra*. There, Congress attached liability to a relationship, that of employer and employee, that was entirely the creation of the voluntary conduct of the parties in pursuit of wholly private interests. In contrast, it is the statutory scheme of FIFRA that creates the relationship of original data submitter and subsequent applicant out of which the compensation liability under FIFRA arises.

There could be no doubt that the scheme would be constitutional if an Article III court could correct errors of law and exercise some review of the factual findings, as in the typical case of judicial review of action by a federal administrative agency. See *Northern Pipeline*, 458 U.S. at 83; *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). See also *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 53 (1936).

The district court could have as effectively remedied any defect it found simply by enjoining the operation of only the portion of Section 3(c)(1)(D)(ii) that states: "the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination * * * except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct." This narrower relief would conform to the intent of Congress, as expressed in FIFRA's severability clause (§ 30, 7 U.S.C. 136x):

> If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this [Act] which can be given effect without regard to the invalid provision or application, and to this end the provisions of this [Act] are severable.

The data use and compensation provisions of Section 3(c)(1)(D)(ii) *can* "be given effect" without regard to the allegedly invalid provision limiting judicial review. The statute would, as Congress intended, continue to allow applicants for registration to rely on previously submitted data (provided they offer to pay compensation), thus fostering competition and discouraging wasteful duplicative testing. The parties would remain free to resolve controversies about the amount and terms of compensation by negotiation, and to take disputes to arbitration. Only the scope of judicial review of arbitration decisions would be modified, and then only to the extent found necessary to achieve compliance with Article III.

Section 3(c)(1)(D)(ii) confers on persons such as appellees a wholly federal "statutory right to obtain compensation from a subsequent applicant whose registration application relies on data originally submitted by" such persons. *Monsanto*, slip op. 31. If the limitation on judicial review were severed, there would be no barrier to a federal court challenge to a FIFRA arbitration decision that allegedly diminished that right. The aggrieved person would have a cause of action arising under FIFRA either expressly, see *Monsanto*, slip op. 31, or impliedly. District courts would have jurisdiction under 28 U.S.C. 1331 to review arbitration decisions under FIFRA since the challenge would be a civil action "arising under the * * * laws * * * of the United States" that would not be precluded by the valid portions of FIFRA.[25] See *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 694 & n.18 (1963) (action to enforce award of Adjustment Board under Railway Labor Act is action arising

[25] Aside from the limitation on review of arbitrators' decisions, the only arguably relevant FIFRA jurisdiction provision states that "other final Agency actions not committed to Agency discretion by law are judicially reviewable in the district courts." FIFRA § 16(a), 7 U.S.C. 136n(a).

under laws of United States with jurisdiction in federal district courts).[26]

Whether a constitutionally invalid provision can be severed from a statute is a matter of congressional intent, *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 10-11; *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *Tilton* v. *Richardson*, 403 U.S. 672, 682-684 (1971); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938); but the question of intent is presumptively answered by the presence in the statute of a severability clause, *INS* v. *Chadha*, slip op. 11. Moreover, absent express evidence of congressional intent to the contrary, where "what remains after severance 'is fully operative as a law,'" a provision will be "presumed severable," *INS* v. *Chadha*, slip. op. 13, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

Nothing in FIFRA or its legislative history rebuts these presumptions. As we have shown, pages 30-31, *supra*, if Article III requires broader judicial review the basic scheme would not be unworkable, even if there were some greater delay in the resolution of some compensation issues. There is no indication,

[26] In a case involving a specific challenge to the outcome of an arbitration decision (unlike the situation here, see pages 16-18, *supra*), a plaintiff could assert the appropriate cause of action and identify the basis under which jurisdiction is asserted. For example, in the challenge brought by PPG Industies seeking review of the arbitration decision involving appellee Stauffer, PPG's complaint, Stauffer's counterclaim, and Stauffer's cross-claim all state that jurisdiction over the subject matter is based on, among other sections, 28 U.S.C. 1331. Complaint, Civil Action No. 83-1941 (D.D.C. filed July 7, 1983); Answer, Counterclaim and Cross-Claim of Defendant Stauffer Chemical Company (filed Sept. 6, 1983).

moreover, that if Congress had thought that broader and more time-consuming judicial review was required, it would have jettisoned the entire data licensing scheme.

The data consideration and compensation provisions in Section 3(c)(1)(D)(ii), including the provision for binding arbitration and the limitation on judicial review, were a refinement of the mechanism Congress first developed in 1972. While one purpose of adopting arbitration was to shorten and simplify the compensation-setting process, an equally important purpose was to eliminate the decision-making burden the prior statute had imposed on EPA.[27] The particular means chosen for resolving disputes was not central to the question whether applicants should be able to base their applications upon previously submitted data. Indeed, without the data-licensing scheme, there will be no compensation disputes *needing* resolution.[28] Accordingly, the district court failed

[27] The Senate Report states (S. Rep. 95-334, 95th Cong., 1st Sess. 8 (1977)):

> The reasonableness of compensation is difficult to determine and the Environmental Protection Agency was not established to make such determinations. The Subcommittee agreed that the amount and terms of reasonable compensation would be determined by the parties involved—the original submitter of the data and the later applicant who wishes to rely on it.
>
> The Subcommittee also adopted a provision for binding arbitration under procedures established by the Federal Mediation and Conciliation Service, if the parties fail to agree on compensation.

[28] If, despite our argument, the limitation on judicial review is found not to be severable and Section 3(c)(1)(D)(ii) therefore is found invalid, it remains unclear why the remedy

to fulfill its duty "to save and not to destroy" the remaining portions of the statute. *Tilton* v. *Richardson*, 403 U.S. at 684, quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 10-11 (opinion of White, J.).[29]

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should be a judicially-crafted substitute scheme that gives data submitters an absolute right to *veto* use of their data. It would be more reasonable to hold that the data formerly governed by Section 3(c)(1)(D)(ii) may be cited without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data, since there would no longer be "any period for which compensation is required for the use of an item of data." FIFRA § 3(c)(1)(D)(iii), 7 U.S.C. 136a(c)(1)(D)(iii).

[29] That duty had been made all the more emphatic by the fact that this Court in *Monsanto* had just sustained the constitutional validity of provisions whose enforcement the district court again saw fit to enjoin.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to vacate the injunction and to dismiss the complaint.

Respectfully submitted.

REX E. LEE
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANNE S. ALMY
JACQUES B. GELIN
JOHN A. BRYSON
Attorneys

GERALD H. YAMADA
Acting General Counsel

EDWARD C. GRAY
MARCIA E. MULKEY
Attorneys
Environmental Protection Agency

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In the Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Appellant,

vs.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE GULF AND GREAT PLAINS LEGAL FOUNDATION IN SUPPORT OF APPELLEES

WILKES C. ROBINSON*
BARBARA LUANN RIDGEWAY
GULF & GREAT PLAINS LEGAL FOUNDATION
1000 Brookfield Building
101 West 11th Street
Kansas City, Missouri 64105
(816) 474-6600

**Counsel of Record for Amicus Curiae Gulf & Great Plains Legal Foundation*

February 28, 1985

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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BRIEF OF AMICUS CURIAE GULF AND GREAT PLAINS LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Amicus Gulf and Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the preservation of the free enterprise system and the protection of liberty and property rights of citizens.

Headquartered in Kansas City, Missouri, Gulf and Great Plains Legal Foundation is in the middle of America's agricultural region. Innovative and effective technology in the pesticide industry is vital to agricultural productivity. The Foundation has represented farmers in cases of concern to the agricultural community and has

represented the interests of consumers of agricultural products.

As well, Gulf and Great Plains Legal Foundation has a continuing interest in issues affecting the chemical industry and has submitted comments before federal agencies and appeared as amicus curiae in cases raising issues of concern to the industry. The Foundation has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues.

The purpose of amicus in submitting this brief is not to reiterate the constitutional arguments advanced in Appellees' Brief. Rather, this Amicus Brief is submitted to show the economics involved in producing a successful pesticide and the potential effects the present compensation system could have on innovation within the industry.

SUMMARY OF ARGUMENT

The pesticide business is a highly regulated industry in the United States. The major piece of legislation affecting those companies involved in developing and producing pesticides in the United States is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C.A. 136-136y (West 1980 & West Supp. 1984). The question facing this Court is whether the FIFRA compensation system set forth at 7 U.S.C. §136a(c)(1)(D) is constitutional when that system provides no standards for determining the appropriate amount of compensation and provides virtually no judicial review of the compensation decision.

Gulf and Great Plains Legal Foundation is concerned about the effect this compensation system could have on innovation in the pesticide industry. Pesticide producers are engaged in a high risk business. Each year, companies spend millions of dollars on research and development of new pesticides. Thousands of compounds are tested but very few are commercially successful. The few that are successful must support the years of research and development necessary to produce a commercially viable pesticide.

Obtaining the data necessary to support EPA registration greatly adds to research and development expenditures both in terms of time and money. Regardless of the great investment, it is this information that is subject to forced sale under FIFRA. Release of such information to competitors could destroy the commercial success of a product. Competitors who purchased the data would be given in shortcut to the pesticide market without incurring the great expense of time and money to orginally develop the data.

FIFRA has had and will have an impact on the overall availability of pesticides. The present statutory protections afforded product developers by both FIFRA's "exclusive use" provisions and by the patent law are not sufficient to protect the considerable investment in research and development. Clear standards must be set forth to guide the determination of compensation for data submitted under FIFRA. As well, opportunity for meaningful judicial review of the compensation decision must be required. If such safeguards are not incorporated, incentives for the industry to devote resources to research and development will be severely curtailed and innovation in the industry will suffer.

ARGUMENT

I

THE PESTICIDE INDUSTRY IS AN EXTREMELY HIGH RISK ENTERPRISE INVOLVING LONG TERM INVESTMENT IN RESEARCH AND DEVELOPMENT AMOUNTING TO MILLIONS OF DOLLARS ANNUALLY.

The pesticide industry is an important industry in this country. Thousands of companies are engaged at some level or another in the production and marketing of pesticides. Most of these companies are engaged in the manufacture of end-use or formulated products containing an identical or similar "active ingredient" combined with similar "inert ingredients" to dilute, dissolve, stablilize or otherwise improve the performance of the final product. There are approximately 400 producers of basic pesticidal chemicals or "active ingredients", in the United States, of which approximately ten percent engage in the development of new products. The basic pesticidal chemicals are generally pure forms of active ingredients used to produce final formulated products. Basic manufacturers generally undertake the costly and time consuming testing to establish the risk and benefit characteristics of the chemicals that are the basic ingredients for all pesticides. S. Rep. No. 334, 95th Cong., 1st Sess. 27 (1977). Total sales of pesticides can amount to billions of dollars a year. Sales of pesticide chemicals in 1975, for example, were over $2.16 billion at manufacturers' value. Gannon, *FIFRA and the "Taking" of Trade Secrets*, 8 B.C. Envtl. Aff. L. Rev. 593, n.3 (1980); S. Rep. 334, 95th Cong., 1st. Sess. 62-63 (1977).

Research and development of commercially viable pesticides requires expenditure of millions of dollars annually. According to an industry survey in 1975 in which 37 companies reported, $160.5 million were spent for research and development costs. S. Rep. No. 334, 95th Cong., 1st Sess. 62 (1977). It is estimated that an individual company must commit to the expenditure of $5 million to $15 million annually for several years before it will develop a potential commercial pesticide candidate. *Monsanto v. Acting Administrator,* 564 F. Supp. 552, 555 (E.D. Mo. 1983).

In making the decision to enter the pesticide market, company management must realize that a particular product will not make a profit for at least twenty years. Joint Appendix at 130, *Ruckelshaus v. Monsanto,* 467 U.S. ....., 104 S.Ct. 2862 (1984) [hereinafter, *Monsanto* Joint Appendix]. Initially, a problem of sufficient magnitude as to warrant the tremendous amount of time and energy necessary to create and market a solution must be identified. *Id.* Market surveys must be conducted to estimate the number of potential buyers for the product to be developed. If the company is inaccurate in its assessment of the marketplace, millions of dollars could be spent in development of a product that is a technical success, but a commercial failure. *Id.*, p. 136.

Additionally, a problem must be identified that will still be a problem in twenty years. This is necessary because it could take twenty years to solve the problem and get a pesticide on the market. To solve the problem, millions of dollars will be spent annually on scientific personnel, facilities, and sophisticated equipment. *Monsanto v. Acting Administrator,* 564 F. Supp. 552, 555 (E.D. Mo. 1983); *Monsanto* Joint Appendix at 131.

Thousands of compounds will then be screened each year. Most companies examine between 3,000 to 8,000 compounds annually. *Monsanto* Joint Appendix p. 134. The compounds must be narrowed down to those most likely to succeed and then resources devoted to the search for the single best compound. This is an area of great risk—research dollars could be spent in vain if a near miss is chosen rather than a commercial hit. *Monsanto* Joint Appendix at 134, 135.

Once a product is chosen, the process of gathering data for EPA registration is begun. Only registered pesticides may be produced, distributed, sold, or used in the United States. 7 U.S.C.A. §136a (West 1980 and West Supp. 1984). The present registration system forces a product down an expensive path from discovery to marketability. *See* McGarity and Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies,* 93 Harv. L. Rev. 837 (1980) [hereinafter cited as McGarity and Shapiro]. The registration process imposes costs by requiring the company to submit data in support of EPA product registration. S. Rep. No. 334, 95th Cong., 1st Sess. 30-34 (1977). Development of data required to support initial registration of each successfully marketed pesticide may typically cost in excess of $23 million. *Ruckelshaus v. Monsanto,* 467 U.S. ....., 104 S.Ct. 2862, 2871 (1984). A 1976 industry survey found that ten percent of industry outlays for research and development went solely to support registration of products with EPA. National Agricultural Chemicals Association Survey, April 14, 1976, *reprinted in* S. Rep. 334, 95th Cong., 1st Sess. 62 (1977).

It has been conservatively estimated that preparation of the toxicology reports necessary for registration could take between forty-eight and fifty-six months to complete.

This estimate is conservative because it assumes no delays, total efficiency, and a scientific team devoted solely to the task of preparing the reports. Many unforseen circumstances could extend the process. *Monsanto* Joint Appendix at 134, 135.

Time is virtually everything in the pesticide industry. It is the key to profitability. *Monsanto* Joint Appendix at 153. From the time a company first develops a product, it can take six to eight years to obtain registration. *Id.* at 138. Even after the discovery, development and registration process is complete, there may be no immediate return on investment. The fact that a pesticide is placed on the market, does not insure its success. If the toxicology is not right, the product fails. If the toxicology is good but the cost is not competitive, the product fails. If the production is not consistent, there will be no repeat buyers and the product will fail. *Id.* at 135, 136.

Assuming a company manages to create a product with good toxicology and consistent production at a fair price, there is still a lag-time before profits are realized. Substantial profits are not realized until the product penetrates the market. Pesticides usually reach their peak of profitability twelve to twenty years after introduction to the market. *Id.* at 153.

Obviously, there are many variables that can affect the success of a pesticide. Industry statistics show that only one out of 20,000 compounds is successfully marketed. *Id.* at 132. For highly successful compounds, the number tested could be significantly increased. To illustrate, Monsanto's highly successful product, Lasso, was compound number 59,144. Baker's Sencor was 94,337—meaning the company had synthesized and screened 94,337 compounds for a product before they hit on Sencor. *Id.* at 132.

The costs of supporting this process of research and development are enormous. One major producer estimated that up to $80 million annually were spent by the company alone for research and development of agricultural chemicals. *Id.* at 133. It is true that there is a large investment return on successful pesticides. But the one successful pesticide must pay for the thousands of losers developed in the discovery process. S. Rep. No. 334, 95th Cong., 1st Sess. 36 (1977). The financial success of most major pesticide companies rests on profits produced by a very limited number of commercially successful products. In 1975, only twelve products accounted for 40% of the value of pesticide sales. Forty-five products accounted for 70% of total sales. S. Rep. No. 334, 95th Cong., 1st Sess. 60 (1977). Because of the great investment of time and money placed in development of one product, the success of that product is vital to the success of the investing company. Unfortunately, the present FIFRA compensation scheme provides little protection to the investment necessary for successful pesticide production.

II

STATUTORY PROTECTION OF TRADE SECRET INFORMATION IN THE PATENT LAW AND FIFRA'S "EXCLUSIVE USE" PROVISIONS ARE NOT SUFFICIENT TO PROTECT THE ENORMOUS LONG TERM INVESTMENT IN RESEARCH AND DEVELOPMENT.

Since the federal government first began regulating the chemical industry, there have been ever-increasing compliance requirements. With increased requirements come increases in the amount of data required to prove compliance. The data presently required to be submitted in support of EPA registration often contain trade secret

information concerning formulas, test methods and results. As discussed in Section I, obtaining this information is very costly both in terms of time and resources. FIFRA was enacted in 1947, and has been amended on three occasions—in 1972, 1975 and 1978. Each amendment has gradually diminished the protection given to data submitted in support of product registration. *See* Gannon, *FIFRA and the "Taking" of Trade Secrets,* 8 B.C. Envtl. Aff. L. Rev. 593-595 (1980).

The most recent amendment to FIFRA, the Federal Pesticide Act of 1978, has produced several changes that directly affect developers of new pesticides. Pub. L. No. 95-396, 92 Stat. 819 (1978). First, the 1978 amendments took away the ability of developers to label sensitive information as "trade secrets" and thus prevent it from being used or disclosed. Data developers can no longer prevent competitors from using the information that took them many years and millions of dollars to create.

Second, the 1978 amendments created three categories of submitted test data. The first category provides that data submitted in support of an application for a new active ingredient or new use of a pesticide, which is registered after September 30, 1978, is protected by a 10-year period of "exclusive use". Under former law, as written and construed, the "exclusive use" provisions applied not only to trade secret information such as the formula for new active ingredients, but also applied to the test data marked as secret and submitted to the EPA in support of registration. Pub. L. No. 92-516, 86 Stat. 973 (1972) [hereinafter cited as 1972 amendments]; *Chevron Chemical Co. v. Costle,* 443 F. Supp. 1024, 1026 (N.D. Cal. 1978); *Dow Chemical Co. v. Costle,* 464 F. Supp. 395, 398 (N.D. Mich. 1978); *Mobay Chemical Corp. v. Costle,* 447 F. Supp. 811,

824-27 (W.D. Mo. 1978). Limiting the "exclusive use" provisions to new active ingredients and new uses results in considerable restriction of the protection formerly afforded by the 1972 and 1975 amendments. The second category provides that any data submitted on or after January 1, 1970, may be used in support of another application within a 15-year period following submission of the data, but only if the applicant has offered to compensate the original data submitters. This provision applies to all data not qualifying for the ten-year "exclusive use" provision. The third category created by the 1978 FIFRA amendments concerns data for which periods of "exclusive use" or compensated use have expired. This data may be freely considered by EPA in support of any other application. 7 U.S.C.A. §136a(c)(1)(D) (West 1980 & West Supp. 1984). The last two categories require an original data submitter to release data for use by a competitor if a compensation figure is established and paid. The data must be released regardless of the fact that the data was submitted under the trade secret protection of prior law.

A very direct way that the 1978 FIFRA Amendments affect producers is by the changes it created in the data compensation system. Under former law, if the parties could not agree on compensation, the EPA Administrator would determine the amount and method of payment. If the original data submitter did not agree with this determination, he could appeal to a federal district court for full judicial review. Pub. L. No. 94-140, §12, 89 Stat. 751, 755 (1975). The 1978 amendments provide that if the parties cannot agree on a compensation figure, the dispute will be settled through binding arbitration by the Federal Mediation and Conciliation Service. Congress has set down no standards which the arbitrator is to use in fixing the amount of compensation. Also the mandatory arbitration

scheme has virtually no provision for judicial review. The statute has stripped the courts of their traditional scope of judicial review by limiting review to cases of fraud, misrepresentation or misconduct by a party or the arbitrator. 7 U.S.C.A. §136a(c)(1)(D) (West 1980 and West Supp. 1984). An applicant submitting test data may submit the data directly or may rely on data appearing in public litterature or on data that has previously been submitted to the agency by a prior applicant. An applicant who does not wish to expend the time and money necessary to create original data may rely on data already developed by another. The original data developer has no choice but to agree on a price or submit to a forced sale of his data.

There is no longer any real protection for the formerly confidential information devoloped through the enormous investment of the original data submitter. It is true that the statute grants a 10-year period of "exclusive use" to the developer of new active ingredients or to one who develops a new use for a previously registered pesticide. However, this does nothing to protect from disclosure the data concerning toxicology, metabolism, environmental chemistry, efficacy and crop safety that have been submitted to EPA. Neither does it prevent lab procedures for obtaining such data from falling into the hands of competitors.

Neither can the data developer rely on patent protection to protect the investment in research and development. Patent protection lasts for a period of seventeen years. 35 U.S.C.A. §§1-376 (West 1984). A patent provides that during the seventeen-year period commencing with the issuance of the patent no one other than the patent's owner can "practice" the invention without the owner's permission. *Id.;* S. Rep. No. 334, 95th Cong., 1st

Sess. 36 (1977). A patent may be issued to cover a newly discovered chemical, a newly discovered use for a previously registered chemical, or a new method for producing the chemical. 35 U.S.C.A. §§1-376 (West 1984).

There are two significant reasons why the patent system may be inadequate to protect incentives for innovation. First, some discoveries are unpatentable because they do not meet the statutory requirement of being new, novel, and nonobvious. McGarity and Shapiro at 850. For example, pesticide innovations lack patent protection if they are composed of active ingredients that were known to kill pests before the attempt to patent them. *Id.*, citing Federal Insecticide, Fungicide, and Rodenticide Act: Hearings before the House Comm. on Agriculture, 95th Cong., 1st Sess. 321-22 (1977) (Statement of John E. Donalds, Dow Chemicals, U.S.A.). As well, data generated during the production and testing of a pesticide are not patentable. Producers try to maintain the data concerning test procedures and test results secret. Companies maintain their research and test data under lock and key and employees are permitted access only on a "need-to-know" basis. Security guards are often deployed around the clock to protect this highly valuable information. Brief of Appellee at 26, *Ruckelshaus v. Monsanto,* 467 U.S. ....., 104 S.Ct. 2862 (1984). *See also* Gannon, *FIFRA and the "Taking" of Trade Secrets,* 8 B.C. Envtl. Aff. L. Rev. 593, 594 (1980).

The extent of protection that the patent laws provide is also affected by the fact that actual protection can be shorter than the prescribed seventeen-year period. Developers of new chemicals or new pesticidal uses normally make prompt applications for patents to avoid the possibility of loss of rights through publication or independent invention by another. In the case of pesticide chemicals,

the patent normally issues well before the developer has established, through long-term testing, that the chemical is safe and effective enough to be registered under FIFRA. S. Rep. No. 334, 95th Cong., 1st Sess. 36 (1977). Six or more years of the seventeen allowed under patent law could elapse before the product is ever put on the market. *Id.; Monsanto* Joint Appendix at 171. After the seventeen-year period expires, the patent laws provide no further protection. The safety and efficacy data could be submitted by a competitor in support of an application to a regulatory agency for approval of an equivalent product. McGarity and Shapiro at 849. Because these firms often do not maintain research operations or have other cost advantages over the firms who do, they could in many cases undersell the original developer. In light of the time and expense of testing, this would deprive an innovater of substantial lead time and impose a significant cost disadvantage. All of this could significantly cut into the return on the investment dollar. Unless a constitutional compensation system is established, investors will be discouraged from taking the financial risk necessary to promote innovation in the pesticide industry.

III

UNLESS A CONSTITUTIONAL COMPENSATION SYSTEM IS ESTABLISHED, COMPANIES WILL BE DISCOURAGED FROM TAKING THE FINANCIAL RISK NECESSARY TO PROMOTE INNOVATION IN THE PESTICIDE INDUSTRY.

The only sure way for a company not to disclose trade secrets is not to market the products at all. Statutory protection afforded by patent law and FIFRA's "exclusive use" provisions do not prevent disclosure of all valuable information submitted to the agency.

Considerable damage is done to the research and development investment of the original data submitter when data submitted to the agency are disclosed to a competitor. Disclosure of health and safety testing data provide competitors with insights concerning their own research in similar areas for related products and imitation pesticides. Such insights could lead to a breakthrough that would undermine the ability of the original innovator to reap the benefits of its innovation. F. Dworkin, Impact of Disclosure of Safety and Efficacy Data on Expenditures for Pharmaceutical Research and Development 12 (April, 1978) (Staff Paper, Economic Analysis Group, FDA Office of Planning and Evaluation). Thus, the technological ability of competitors is considerably increased without a corresponding expenditure of years and millions of dollars in product research and development.

Companies face disclosure of their valuable data with great apprehension:

> [T]he companies fear that competitors will be able to enter the marketplace at lower startup costs since they do not have to produce data to support registrations. The companies also fear that rivals who gain access to the safety and efficacy data will be able to derive other benefits from them which will reduce the producers' competitive advantage. Specifically, the data are also valuable for meeting state or foreign registration requirements, defining and recording advertising and warranty claims, defending against product liability actions, providing leads for product development and improvement, and for discovering cost efficient manufacturing and research methodology and other spin-off technology as well. Gannon, *FIFRA and the "Taking" of Trade Secrets,* 8 B.C. Envtl. Aff. L. Rev. 593, 605 (1980).

The ability of a company to recover its investment would be quickly destroyed if its rival were furnished the trade secret data on any one of the few products a successful company relies upon to recoup its research and development expenditures. This "free ride" would allow such producers an artificial cost advantage at the expense of a company that invested in research and development.

The most important of the property rights afforded company secrets is the right to prevent unauthorized use or disclosure of information. *Underwater Storage, Inc. v. United States Rubber Company,* 371 F.2d 950, 954 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 911 (1967). Once disclosed, all trade secret rights are forever forfeited. *Fisher Stoves v. All Nighter Stove Works, Inc.,* 626 F.2d 193, 196 (1st Cir. 1980); *Harrington v. National Outdoor Advertising Company,* 355 Mo. 524, 196 S.W.2d 786, 791 (1946). The FIFRA provisions cause a transfer of the value of and right to use data to others, particularly competitors, and do so with no standards for setting the amount of compensation and with virtually no judicial review. Such appropriation of data must not be sustained unless a constitutional system of compensation is provided.

It has been suggested that the compensation scheme established by the 1978 FIFRA amendments is necessary to promote competition within the pesticide industry. However, it is recognized that vigorous competition already exists in the pesticide market. *See Monsanto v. Acting Administrator,* 564 F. Supp. 552 (E.D. Mo. 1983); *see also* Gannon, *FIFRA and the "Taking" of Trade Secrets,* 8 B.C. Envtl. Aff. L. Rev. 593 (1980). Rather than helping competition, releasing information could *hurt* competition. It would reduce competition in innovation by eliminating the incentive to invest in costly research and testing. In fact, by permitting a "free ride" it would actually cause market failure. J. Hirschleifer, *Price Theory and Applications* 451 (1976). EPA regulations have already damaged competition. Some firms have left the pesticide research and development field in recent years. Other firms have consolidated—perhaps in part to help spread the cost of research and development and registration of new pesticides. S. Rep. No. 334, 95th Cong., 1st Sess. 51 (1977).

The lack of standards and meaningful judicial review on the compensation issue could result in firms shifting resources away from research and development and into activities offering more promising rates of return, as economists have noted as happening in the drug industry. Grabowski, Vernon & Thomas, *The Effects of Regulatory Policy and the Incentives to Innovate: An International Comparative Analysis,* in Impact of Public Policy on Drug Innovation and Pricing 47, 53 (S. Mitchell and E. Link, eds. 1976).

Few would stand to profit from cutbacks in the pesticide industry. Loss of improvement and innovation would be the result. Pesticides are used world-wide to control destructive plants and animals and are partially responsible for greater crop production, a decreased incidence of debilitating diseases, and generally improved standards of living. *Constitutional Challenges to FIFRA's Use and Disclosure Safeguards Yield Mixed Results,* 11 Envtl. L. Rep. (Envtl. L. Inst.) 10157 (August, 1981). Successful pest control accounts for a substantial portion of the dramatic increase in American farm yields and has resulted in lower food prices for the American consumer. S. Rep. No. 334, 95th Cong., 1st Sess. 32 (1977). Unless the pesticide producers and innovators have reason to believe that they will receive a fair return on their research dollar, cutbacks in development programs are the assured result. Much would be lost if this were allowed to happen.

CONCLUSION

Tremendous amounts of time and financial resources are devoted yearly to research and development of new pesticides. No small part of that investment is spent on preparing the safety and efficacy data on the pesticide necessary for EPA registration. As FIFRA now stands, certain data submitted to EPA in support of pesticide registration may be used by a competitor in support of registration of the competitor's pesticide or for use to improve lab procedures and testing methods. The competitor must compensate the original data developer for use of the data.

The present compensation system provides no standards for determining the compensation figure and allows for virtually no judicial review. Such a system shortens the amount of time necessary to obtain EPA registration. It may also allow the competitor to purchase the data at below market price. Thus the competitor could be given both a time and financial shortcut to the pesticide market. Shortcuts granted to competitors only serve to increase the risk involved in the research and development of new pesticides. Unless companies investing in product development are assured of a constitutional compensation system, with standards and judicial review, cutbacks in research and development are certain. Pesticides are extremely valuable in preventing disease, increasing crop production and reducing the cost of agricultural products. Environmentally safe and effective pesticides are also relied upon to help reduce the amount of chemical pollutants found in the land and water. To keep vitality in new product development investment in research and development must not be discouraged.

For these reasons, amicus respectfully requests this court to affirm the ruling of the lower court.

Respectfully submitted,

WILKES C. ROBINSON*
BARBARA LUANN RIDGEWAY
GULF & GREAT PLAINS LEGAL FOUNDATION
1000 Brookfield Building
101 West 11th Street
Kansas City, Missouri 64105
(816) 474-6600

Counsel of Record for Amicus Curiae Gulf & Great Plains Legal Foundation

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On Appeal From The United States District Court For The Southern District Of New York

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BRIEF OF APPELLEES UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*

KENNETH W. WEINSTEIN
(Counsel of Record)
LAWRENCE S. EBNER
STANLEY W. LANDFAIR
ALISON L. DOYLE
McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Appellees

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether compulsory arbitration of private monetary claims between individuals, with no opportunity for judicial review, violates Article III of the Constitution.

2. Whether Congress' delegation of legislative power to an arbitrator to decide how to compensate an owner for the use of his proprietary information by others, with no statutory standard and no judicial review, violates Article I of the Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District Of New York

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BRIEF OF APPELLEES UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*

STATEMENT

Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2874 (1984) (*"Monsanto"*), held that trade secret pesticide research data are a form of property recognized by the

Constitution. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* (1982), affords the original submitter of these data the right to be compensated when his data are used by the Environmental Protection Agency (EPA) at the request of a subsequent applicant to support a copycat ("me-too") pesticide registration. FIFRA § 3(c)(1)(D)(ii).

In the absence of agreement between the parties, the submitter can obtain compensation only through binding arbitration under the auspices of the Federal Mediation and Conciliation Service (FMCS), a labor mediation agency that has no expertise in resolving commercial disputes.[1] *Id.* The arbitrator appointed by FMCS is not an Article III judge, having neither non-diminishable compensation nor lifetime tenure, but is selected individually for each case.

FIFRA provides the arbitrator with no standard for deciding how compensation is to be determined, and the arbitrator's decision is "final and conclusive." Neither the submitter nor the applicant may obtain review of the decision in an Article III court, absent fraud or misrepresentation. *Id.* A submitter who refuses to participate in an arbitration proceeding forfeits his right to compensation. *Id.*

In *Monsanto*, the Court defined the extent to which the use of trade secret research data under FIFRA does, and does not, constitute a taking under the Fifth Amend-

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[1] Because FMCS "rarely arranges or conducts arbitration of commercial disputes," 45 Fed. Reg. 55,395 (1980), it appoints arbitrators to FIFRA cases from the roster of the American Arbitration Association. 29 C.F.R. § 1440.1 (1984). The Director of FMCS serves at the pleasure of the President. 29 U.S.C. § 172 (1982).

ment.[2] However, the Court deferred any decision on the constitutionality of the arbitration scheme under Article III because Monsanto's data (unlike appellees' data here) had not been used to support me-too registrations, so that Monsanto had no extant right to obtain compensation. *Monsanto*, 104 S. Ct. at 2882.

Appellees are inventors and producers of chemical and biological pesticides. In order to obtain federal pesticide registrations for their products, they have submitted to EPA voluminous research and test data. These data have been used by EPA repeatedly at the request of subsequent applicants to support me-too registrations for which no agreement on compensation has been reached by the parties.[3] Appellees thus have an existing right to be compensated for the use of their trade secret and proprietary data. But to obtain the compensation now due, appellees must either accept the adjudication of their claims by an arbitrator without recourse to an Article III court, or forfeit compensation altogether.

This case presents the question that the Court deferred in *Monsanto:* whether it is unconstitutional to require appellees to submit the adjudication of private compensa-

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[2] Pursuit of compensation under FIFRA is a prerequisite to the filing of any available Fifth Amendment taking claim against the United States. *Monsanto*, 104 S. Ct. at 2881 & n.21. If no taking claim is available (as is the case, for example, for data submitted before 1972 or after 1978), compensation from the applicant under FIFRA is the submitter's only remedy for the use of his data. *See infra* note 13.

[3] As of October 1983, appellees had identified approximately two dozen me-too registrations that had been issued by EPA using appellees' data (Docket Entry No. 132 at 2), and since that time have identified numerous others.

tion claims to an arbitrator who is not under the authority of an Article III court.

A. The Importance Of Compensation

The development of a pesticide that is safe to humans and the environment, but that is effective in controlling a specific pest, is an arduous and expensive undertaking that requires years of painstaking research. "The development process may take between 14 and 22 years, and it is usually that long before a company can expect any return on its investment." *Monsanto*, 104 S. Ct. at 2871. For every successful candidate that ultimately reaches the market, appellees must test an average of 20,000 others. *Id.* The research to develop a pesticide typically costs tens of millions of dollars.[4]

These costs are exacerbated by federal regulation. The licensing of pesticides under FIFRA keeps new products off the market while expensive health, safety and environmental testing is being performed and while the test results are undergoing EPA review. The effect is to increase costs still further, substantially delay the production of income from the new product, significantly shorten the term of any available patent protection, and lengthen the period before the innovator can expect any return on its investment.[5]

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[4] The National Agricultural Chemicals Association reported that manufacturers spent $580 million for pesticide R&D in 1983. National Agricultural Chemicals Association, 1983 Industry Profile Survey, at 7. *See also Monsanto*, 104 S. Ct. at 2871.

[5] Office of Technology Assessment, U.S. Congress, Technological Innovation and Health, Safety and Environmental Regulation, at VIII-47 (1981); The Conservation Foundation, Product Regulation and Chemical Innovation, at IV-33 (1980).

Companies that produce copycat pesticide products ("me-too" registrants) do not share the burdens of federal regulation. They do not risk millions of dollars to test a product, taking the chance that EPA ultimately may disapprove it. They do not suffer marketing delay because of the regulatory regimen of testing and review, but on the contrary can avoid testing and obtain a me-too registration within days once the innovator's original product has been approved. Compensation under FIFRA is the principal mechanism available to correct the imbalance caused by the burdens of environmental regulation that would otherwise be borne by the innovator alone.[6]

Many of the research data submitted to EPA by appellees constitute trade secrets. (J.A. 56–63.)[7] Trade secret data have added value, not merely because they unlock the door to registration in this country and around the world, but also because they provide insights for expanding the uses of a pesticide and for developing additional related products. *Monsanto*, 104 S. Ct. at 2871. The data also contain state-of-the-art testing methodologies.[8] This information is of substantial value to competitors and satisfies the requirements for trade secrets under state law. *Id.* at 2871, 2873. In a compensation case, the valua-

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[6] FIFRA also grants innovators a 10-year period of exclusive use for data on new active ingredients registered after September 30, 1978. FIFRA § 3(c)(1)(D)(i). This provision does nothing to protect data concerning the vast majority of pesticides registered before 1978.

[7] The following abbreviations are used in this brief: "J.A." (Joint Appendix); "J.S. App." (Appendix to EPA's Jurisdictional Statement); "EPA Brief" (brief on the merits for the appellant).

[8] *See, e.g.*, Affidavit of Haney B. Camp, Docket Entry No. 76 at 9; Affidavit of John F. McCarthy, Ph.D., Docket Entry No. 94 at 8.

tion of the right to use these trade secret data is a necessary part of the determination of the award.

B. The Stauffer Arbitration

One of the appellees has been through the entire arbitration process. Data developed by appellee Stauffer Chemical Company ("Stauffer") on two of its most important and successful herbicides, with sales of hundreds of millions of dollars in the United States, were used at the request of PPG Industries, Inc. ("PPG") (among others), a large competing manufacturer, to support the issuance of me-too registrations in 1981. (J.S. App. 2a.) After unsuccessful negotiations, Stauffer attempted to obtain compensation from PPG for the use of data concerning one of these herbicides by initiating an arbitration in April 1982.

The arbitrators were selected by FMCS in a manner which Stauffer believes was severely prejudicial. (J.A. 34–37.) The prejudice stemmed from the fact that FMCS held a "Pesticide Data Disputes Training Seminar" for prospective FIFRA arbitrators in October 1980, which was organized and conducted by EPA. *Id.* Despite the fact that FIFRA contains no standard for determining compensation (*see* Part III *infra*), representatives from EPA's General Counsel's Office instructed the cadre of neophyte FIFRA arbitrators at the training session how they should compute compensation. *Id.*[9] The instruction given by EPA counsel advocated legal interpretations on key substantive issues with which Stauffer disagreed and

[9] In 1977, former EPA Administrator Douglas Costle asked Congress to divest the Agency of the responsibility for determining compensation because this is a subject in which EPA "lacks expertise." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

which have the effect of reducing the amount of compensation that can be awarded. *Id.*[10]

Stauffer, as the initiator of the arbitration, requested the opportunity to select an arbitrator from among a panel of persons who had not been instructed in EPA's interpretations of compensation issues. FMCS denied Stauffer's request and insisted that three arbitrators be chosen, and that all three be indoctrinees of the EPA training session. *Id.* at 38–39. In Stauffer's view, the instruction by EPA counsel biased the arbitration tribunal against the use of valuation methods that would result in a fair award.

After a hearing, the EPA-trained and FMCS-appointed arbitrators awarded far less than Stauffer had requested. They awarded Stauffer only $1.465 million plus a royalty of 15 cents per pound of herbicides sold by PPG for 10 years. *Stauffer Chemical Co. v. PPG Industries, Inc.*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983) (J.A. 54). This was approximately $50 million less than the amount to which Stauffer believed it was entitled. Despite the fact that Stauffer is aggrieved by the award (J.S. App. 3a), FIFRA prohibits Stauffer from challenging the adequacy of the award in court.[11]

[10] In the court below, the EPA official who coordinated the training session for FMCS admitted that its "primary objective" was "to train the attendees to (1) determine which data are compensible [sic] and (2) to decide what is reasonable compensation." Affidavit of Robert Forrest, at 4, Docket Entry No. 101. The prospective arbitrators were given voluminous materials, including a chart prepared by EPA counsel "which set forth a method for systematically screening specific data for compensibility [sic]." *Id.* at 5.

[11] To aggravate Stauffer's injury, PPG has continued to enjoy the benefits of its me-too registrations based on Stauffer's data, but still has paid no compensation. Instead, shortly after the arbitration was

(continued)

C. The District Court Proceedings

The principal relief sought by Stauffer and the other appellees in the district court below was a declaration that the compulsory arbitration procedure is unconstitutional, and an injunction restraining further use of any data under § 3(c)(1)(D)(ii) for which compensation could not be obtained in an Article III court.

The district court agreed that it was a clear violation of Article III to compel appellees to submit to an unconstitutional arbitration tribunal in order to adjudicate their compensation rights, and therefore granted the relief that appellees requested. (J.S. App. 25a.) EPA filed a direct appeal from the district court's original judgment, which was pending at the time the Court decided *Monsanto*.

Monsanto was a Taking Clause case. Although Monsanto had raised an Article III claim as an ancillary argument in support of its Taking Clause theory, the Court declined to decide whether the arbitration system was defective under Article III in that case, because Monsanto's data had not actually been used by a me-too registrant and therefore Monsanto had no cognizable compensation claim. 104 S. Ct. at 2882.

EPA's original appeal in this case, then denominated *Ruckelshaus v. Union Carbide Agricultural Products*

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concluded, and despite FIFRA's prohibition against judicial review, PPG filed a suit in district court to challenge the award. PPG Industries, Inc. v. Stauffer Chemical Co., No. 83-1941 (D.D.C. filed July 7, 1983). In answering PPG's complaint, Stauffer filed counterclaims for cancellation of PPG's me-too registrations, or in the alternative (if the arbitration scheme were held to be constitutional), for enforcement of the arbitration award. (If FIFRA were constitutional, no augmentation of the award by the court would be permitted.)

Co., No. 83-1564, was remanded by the Court for further consideration in light of *Monsanto*. 104 S. Ct. 3566 (1984) (mem.). The Court expressed no view as to the merits of the district court's ruling.

On remand, appellees demonstrated to the district court that they were situated differently than Monsanto. Appellees' data had been used by competitors to obtain me-too registrations, and they had the immediate choice of either adjudicating their compensation rights in a non-Article III arbitration, or forfeiting them. Appellees also faced a "clear threat" of the continued use of their data by EPA to support other applicants' registrations. (J.S. App. 4a.) Furthermore, appellee Stauffer had been through an arbitration and was aggrieved by the lack of an impartial Article III forum, as well as by the tremendous shortfall in the award. (J.S. App. 3a.)

The district court agreed and held that nothing in *Monsanto* altered its original decision. (J.S. App. 4a.) EPA again took a direct appeal to this Court and obtained a stay of the judgment. Probable jurisdiction was noted.

SUMMARY OF ARGUMENT

I. This case is justiciable because appellees are squarely presented with a dilemma—they must either submit to an unconstitutional adjudication or forego a valuable right. Appellees' data have been used by EPA repeatedly to grant me-too registrations to others, giving rise to a right to be compensated. Appellees are now forced either to submit to an adjudication of their compensation rights in an arbitration forum which violates Article III, or to forfeit compensation altogether. As the district court below recognized, this compulsion gives rise to a justiciable case or controversy.

Although it is not necessary to suffer an unconstitutional arbitration in order to raise the Article III claim, appellee Stauffer has done so. The district court below found—*and EPA did not contest*—that Stauffer was injured both by the compulsion to resort to the unconstitutional arbitration procedure in order to obtain its statutory entitlement to compensation, and by the fact that it received an unreviewable award approximately $50 million less than the amount to which it claimed entitlement. Under these circumstances, FIFRA's preclusion of judicial review in an Article III court creates a justiciable controversy.

II. FIFRA's compulsion to adjudicate compensation rights before an arbitrator without judicial review violates Article III. The adjudication of private monetary claims between individuals—claims that arise under federal law and that require the valuation of state law trade secrets—is an exercise of the judicial power of the United States. FIFRA violates Article III by vesting the exercise of this judicial power in an arbitrator who is not an Article III judge.

This Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), contains three separate opinions (plurality, concurrence and dissent) which discuss the requirements of Article III. The FIFRA arbitration scheme does not satisfy the requirements expounded in any of these opinions.

Under the rationale of the plurality, compensation is a "private right" because it involves the liability of one individual to another. The determination of monetary liability is a matter that is inherently judicial and that must be resolved by an Article III court. The FIFRA arbitration scheme does not retain "the essential attributes of

judicial power" in Article III courts. Rather, FIFRA vests those powers in an arbitrator and bars substantive review of his decision by the Judiciary.

The concurring opinion in *Northern Pipeline* concluded that Congress may not deprive a litigant of the right to adjudicate state law claims in an Article III court. Although compensation arises under FIFRA, it requires the valuation of the right to use state law trade secrets. The compulsory arbitration of private monetary claims that require the valuation of trade secrets violates Article III.

The dissenting opinion in *Northern Pipeline* suggested that congressionally created adjudicative institutions do not violate Article III if they provide for appellate review by an Article III court. The FIFRA arbitration scheme bars all substantive review, and thus violates Article III under the rationale of the dissent.

III. Because FIFRA delegates legislative power to arbitrators to decide the basis on which to award compensation, without an ascertainable standard and without judicial review, it also violates Article I.

Three district courts, the former Administrator of EPA, and the agency (FMCS) to which Congress delegated authority over the arbitrators, all concluded that Congress provided no standard for the valuation of data for compensation purposes.

Important choices of social policy such as the decision how to compensate an innovator for use of his proprietary information by others must be made by Congress, not an *ad hoc* group of arbitrators. The absence of an intelligible principle for determining compensation, coupled with the preclusion of judicial review to check the abuse of the

arbitrators' undefined delegated authority, violates the Constitution's separation of powers.

IV. Having found FIFRA's arbitration scheme unconstitutional, the district court enjoined EPA from permitting any use of a submitter's data for which compensation should be, but is not, available in an Article III court. This relief was proper because FIFRA expressly conditions the use of a submitter's data upon payment of compensation. The purpose of the compensation requirement is to prevent competitors from obtaining a "free ride" or from "just plain stealing" the use of the submitter's proprietary data without paying for it.

Although Congress' attempt to establish an arbitration scheme with no set standard, insulated from the authority of the Judiciary, is unconstitutional, these features of the scheme are a fundamental part of the congressional design, and therefore must be reformed by Congress, not the courts. Congress' restructuring of the compensation scheme in 1978 was a deliberate effort to establish a private dispute resolution mechanism that does "not require active governmental involvement." The degree of judicial involvement necessary to bring FIFRA into compliance with Article III would directly contradict that design and thwart the congressional purpose of private dispute resolution.

The courts cannot engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. As the Court similarly concluded in *Northern Pipeline*, it is for Congress to determine the proper manner of restructuring the arbitration scheme to conform to the requirements of Article I and Article III in a way that will best effectuate the legislative purpose.

The judgment of the district court should be affirmed.

ARGUMENT

I. THIS CASE IS JUSTICIABLE BECAUSE APPELLEES MUST EITHER SUBMIT TO AN UNCONSTITUTIONAL ARBITRATION OR FORFEIT COMPENSATION

EPA's argument that this case is not "justiciable" is specious. By distracting the Court's attention from the merits, EPA hopes to avoid having the Court focus on the glaring Article III flaw in FIFRA's compensation scheme.

Appellees have been forced either to submit to adjudication of their compensation rights in an arbitration forum which violates Article III, or to forfeit compensation altogether. Because appellees' data have been used by EPA in numerous instances to grant me-too registrations to others, and appellees face a "clear threat" of further erosion of their rights (J.S. App. 4a), appellees now are squarely presented with this dilemma. The choice of either submitting to an unconstitutional adjudication, or foregoing a valuable right, is the kind of direct and immediate injury that clearly gives rise to a justiciable controversy. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956). Appellees have a "personal right . . . to demand Article III adjudication" of their compensation claims, *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 100 (1984), and the abridgement of that right creates a live case or controversy.

The *only* relief that possibly could redress this injury is that which was granted by the district court below. It is beyond the power of the courts to reform the compensation system so that it is in compliance with Article I and

Article III: that must be done by Congress. (*See* discussion *infra* in Part IV.) Compensation is the statutory *quid pro quo* for the use of a submitter's research data by a competitor. Therefore, where no constitutional forum is available to the submitter in which to obtain the compensation to which he is entitled, the only remedy which will prevent his injury is to enjoin the use of the submitter's data by others until Congress reforms the compensation scheme in a manner that complies with Article III. This was the relief granted by the district court, and it directly redresses appellees' injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978).

The relief granted by the district court was necessary to prevent further erosion of appellees' proprietary rights. Appellees are entitled to a "reasonable, certain and adequate provision for obtaining compensation" before the property rights in the trade secret data they have submitted to EPA are further disturbed. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124–25 (1974).

EPA suggests that the only manner in which the Article III claim can be raised is through a suit that seeks enlargement of an arbitration award. (EPA Brief at 16). This argument ignores the fact that such judicial review is precisely what Congress has forbidden, and that it is not within the courts' authority to restructure FIFRA so that Article III tribunals are empowered to augment compensation awards. Appellees are not required to pursue a remedy which does not exist in order to establish the justiciability of a suit which challenges the absence of that very remedy.

The district court therefore quite properly gave no credence to EPA's justiciability argument. Addressing it

in a footnote, the court observed that appellees were injured by "the statutory compulsion to participate in an arbitration procedure that is void *ab initio* as a matter of law and the deprivation thereby of any access to meaningful compensation for the use of their data by subsequent registrants." (J.S. App. 15a n.2.) The district court concluded that the "compulsion to arbitrate," and the fact that "plaintiffs' injuries here would be the direct product of the statutory plan," satisfied the criteria for justiciability. *(Id.)* The court observed that the justiciable injury of which plaintiffs complain is not the result of any specific arbitration; "rather it is the statutory compulsion to seek relief through arbitration to the exclusion of any other mechanism. That issue is clearly ripe for resolution." (*Id.* at 16a n.2.)

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), it was not necessary for Marathon to obtain a final Bankruptcy Court judgment in order to raise its Article III contention. Rather, Marathon filed a motion to dismiss before Northern's claims were adjudicated. "Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises '[t]he judicial power of the United States' described by Art. III of the Constitution." 458 U.S. at 89 (Rehnquist, J., concurring). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Regional Rail Reorganization Act Cases*, 419 U.S. at 143 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

Even if it were necessary to suffer an unconstitutional arbitration in order to raise the Article III claim, appellee Stauffer has done so. (J.S. App. 2a.) In the proceedings

below, the district court found, and *EPA did not contest* (J.S. App. 3a), that Stauffer had been injured by the compulsion to resort to the unconstitutional arbitration procedure in order to obtain its statutory entitlement to compensation—a procedure which resulted in an unreviewable award approximately $50 million less than the amount to which Stauffer claimed entitlement. This is not injury "in some abstract sense" (EPA Brief at 17), but is a concrete injury that stems from FIFRA's compulsion to use an unconstitutional arbitration system. The district court found that this too made Stauffer's claim ripe for review. (J.S. App. 4a.)

The issues raised are clearly justifiable.

II. FIFRA'S DELEGATION OF NON-REVIEWABLE JUDICIAL POWER TO ARBITRATORS VIOLATES ARTICLE III

A. The Compulsory Arbitration Scheme Violates The Language And Purpose Of Article III

Article III, Section 1, of the Constitution enunciates the principle that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides institutional protections for that independence: life tenure and nondiminishable compensation. *Northern Pipeline*, 458 U.S. at 60.

The adjudication of private monetary claims between individuals—claims that arise under federal law and that require the valuation of state law trade secrets—is an exercise of the judicial power of the United States. FIFRA violates Article III by compelling appellees to submit the adjudication of these compensation rights to arbitrators who do not enjoy the constitutional protections afforded Article III judges, and by prohibiting Article III courts from exercising ultimate authority over the adjudication.

The independent Judiciary established by Article III serves a dual function. It prevents the aggrandizement of judicial power by the political branches of government, and guarantees that the process of adjudication remains impartial. *Northern Pipeline*, 458 U.S. at 57–58.

The compulsory arbitration scheme established by FIFRA contravenes both purposes. It intrudes on the power of the Judiciary by creating a legislative tribunal with plenary power to adjudicate monetary claims arising between individuals, a subject which is "inherently judicial." *Id.* at 68–69. It threatens the right to an impartial adjudication because FMCS has complete authority to select and appoint persons to serve as arbitrators on a case-by-case basis, without control by or accountability to any other branch of government. The data submitter thus is put in the untenable position of accepting a "judge" who is dependent upon a government agency for his appointment to each case, and whose decision cannot be reviewed by the Judiciary.[12]

The institutional defect of the arbitration scheme is illustrated by the arbitration between Stauffer and PPG, the first and only arbitration under this section of the statute. FMCS insisted on appointing as arbitrators only persons who had been instructed by EPA counsel how

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[12] An arbitrator appointed by FMCS enjoys far less independence than a bankruptcy judge sitting on the Article I court declared unconstitutional in *Northern Pipeline*. A bankruptcy judge held office for a fixed term of 14 years and could be removed from office only by a panel of Article III judges. His basic qualifications were set by the Senate. His salary, insofar as it was set by statute, was protected. *See Northern Pipeline*, 458 U.S. at 53.

compensation should be determined. Although FIFRA contains no standard which states how compensation should be decided, EPA formulated its own opinion and instructed the neophyte arbitrators as if that opinion were gospel. The instruction provided by EPA was contrary to the legal interpretations which Stauffer believes are correct. As a consequence, the arbitrators appointed by FMCS over Stauffer's objection adopted interpretations which minimized Stauffer's award. Yet FIFRA precluded Stauffer from obtaining review in an Article III court to determine whether the arbitrators' decision is inconsistent with the law and facts of the case.

It is obvious that FIFRA's compulsory arbitration scheme does not comply with the strictures of Article III, and as a result, poses the very threat to judicial impartiality that the Framers sought to avoid.

B. The Compulsory Arbitration Scheme Violates The Article III Precepts Enunciated In *Northern Pipeline*

FIFRA's arbitration scheme presents a far more egregious violation of Article III than the Bankruptcy Court adjudication held unconstitutional in *Northern Pipeline*. Because it bars *all* substantive control by the courts of the inherently judicial adjudication of private monetary claims, the FIFRA arbitration scheme fails to satisfy the Article III requirements enunciated in *Northern Pipeline* by the plurality (Justices Brennan, Marshall, Blackmun and Stevens), by the concurring Justices (Justices Rehnquist and O'Connor), or by the dissent (Justices White, Burger and Powell).

1. In the view of the *Northern Pipeline* plurality, matters of "private rights" (to the extent they are adjudicated in the federal system) can be decided only by Article III courts. Article III thus prohibits Congress from vesting

jurisdiction in legislative courts to decide private-rights disputes.

Private rights involve matters that are "inherently judicial," including "the liability of one individual to another under the law as defined." *Northern Pipeline*, 458 U.S. at 69–70 (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). Such private-rights disputes "lie at the core of the historically recognized judicial power." 458 U.S. at 70.

Public rights, on the other hand, need not be adjudicated by Article III courts. The public rights doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Northern Pipeline*, 458 U.S. at 67–68 (citing *Crowell v. Benson*, 285 U.S. at 50). A matter of public rights must at a minimum arise "between the government and others." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Thus "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.' " *Northern Pipeline*, 458 U.S. at 69 n.23.

The adjudication of compensation under FIFRA clearly is a matter of private rights. The purpose of the proceeding is to determine "the liability of one individual to another under the law as defined." The compensation proceeding involves the valuation of the right to use trade secrets and other proprietary information. These are matters that are "inherently judicial" and that historically have been the subject of judicial actions. *See, e.g., Peabody v. Norfolk*, 98 Mass. 452 (1868); *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng. Rep. 425 (Ch. 1820).

The public rights doctrine does not apply here. FIFRA arbitrations do not arise "between the government and

others," but rather between two private individuals. The government is not a party to the arbitration. The government has no statutory duty in the private compensation proceeding other than "to appoint an arbitrator." § 3(c)(1)(D)(ii). Thus, the adjudication of compensation under FIFRA is a "private rights" matter and must reside under the control of Article III courts.

The *Northern Pipeline* plurality also observed that where a private right arises under federal law, Congress may create "adjunct" tribunals to assist Article III courts in certain factfinding functions. The plurality noted two principles that aid in determining the extent to which Congress may constitutionally vest traditional judicial functions in non-Article III officers. First, when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Article III court. *Northern Pipeline*, 458 U.S. at 80–81.

In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court ruled that the adjudication of federal statutory rights is subject to Article III requirements. "*Crowell* involved the adjudication of congressionally created rights" by an adjunct concerning employees' compensation from employers for work-related injuries occurring in navigable waters of the United States. *Northern Pipeline*, 458 U.S. at 78. The adjudication in *Crowell* was held to be "one of private rights," subject to Article III. *Crowell*, 285 U.S. at 51.

The Court found the adjunct scheme in *Crowell* consistent with Article III because "every compensation order

was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (citing *Crowell*, 285 U.S. at 44–45, 48). The Court upheld Crowell's compensation scheme "in view of these limitations upon the Compensation Commission's functions and powers." 458 U.S. at 78. *See also United States v. Raddatz*, 447 U.S. 667, 676–77, 681–83 (1980).

There is no colorable argument that an arbitrator appointed *ad hoc* to adjudicate compensation under FIFRA can qualify as a factfinding "adjunct" of the Judiciary. FIFRA places *all* judicial functions in the arbitrator, and bars the Judiciary from exercising any meaningful authority. FIFRA provides that the findings and determination of the arbitrator shall be final and conclusive, and specifies that no official or court of the United States shall have power or jurisdiction to review any such findings and determination. § 3(c)(1)(D)(ii).

This scheme obviously does not retain "the essential attributes of judicial power" in Article III courts, as required by *Northern Pipeline* and *Crowell*. The most essential attribute of judicial power is the authority to decide questions of law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). FIFRA expressly usurps this power from the Judicial Branch.

As the district court below concluded, "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation." (J.S. App. 20a.)

> The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters.

> The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

(Id.) Thus, the arbitration scheme plainly fails to meet the Article III requirements enunciated by the *Northern Pipeline* plurality.

2. Justices Rehnquist and O'Connor concurred in the judgment in *Northern Pipeline*, stating a narrower ground for their decision. The concurring Justices observed that Northern's claims against Marathon arose entirely under state law, and that no case had gone so far as to sanction the adjudication of such a claim, against the will of the litigant, in a non-Article III forum. 458 U.S. at 90–91. The concurring Justices did not find it necessary to define the nature of the Article III requirements that apply to the adjudication of congressionally created rights.

Although compensation under FIFRA is a federal right, it requires the valuation of state law trade secrets. In the court below, appellees demonstrated that many of the research data they had submitted to EPA were trade secrets under the appropriate state law, and EPA did not contest these assertions. (J.A. 56–63.) *See Monsanto*, 104 S. Ct. at 2871, 2873. During the course of a compensation proceeding, the arbitrator must decide what value to place on the right to use these trade secrets.

The submitter also may have a right to obtain just compensation for the use of some of these trade secrets under the Tucker Act. *Id.* at 2882. In those instances, the valuation of the trade secret data in a FIFRA compensation proceeding is a prerequisite to the filing of a taking claim in the Claims Court. *Id.* at 2881.[13]

Thus, the holding of the concurring Justices in *Northern Pipeline* also is applicable to the FIFRA arbitration scheme. The compulsory adjudication of appellees' private monetary claims by an arbitrator, which requires the valuation of the right to use state law trade secrets, violates Article III.

3. The dissenting Justices in *Northern Pipeline* offered a different statement of the question for decision. That question was what limits Article III places on Congress' ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. 458 U.S. at 94. The dissenting Justices argued that it is incorrect to parse Article III's requirements on the basis of whether the controversy to be adjudicated arises under state rather than federal law. *Id.* at 97.

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[13] For example, Stauffer submitted trade secret data between October 21, 1972 and September 30, 1978 which were relied on by EPA in granting me-too registrations to PPG. (J.S. App. 2a; J.A. 59–61.) The adjudication of the value of these trade secret data was a prerequisite under *Monsanto* to Stauffer's filing of a taking claim against the United States for the use of these data. Stauffer submitted many data after September 30, 1978, however, which also were relied on in supporting PPG's registrations. *Id.* No taking claim is available for the use of these post-1978 trade secret data. The *only* remedy is compensation under FIFRA. *Monsanto*, 104 S. Ct. at 2876.

Instead, the dissent suggested that "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers." *Id.* at 115. Appellate review of the decisions of legislative courts provides "a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority." *Id.*

> Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Id.

The FIFRA artibration scheme does not satisfy the requirements of Article III as viewed by the dissenting Justices. FIFRA bars substantive appellate review in Article III courts. This leaves FMCS free to appoint arbitrators, as it did in the Stauffer arbitration, who have been isntructed to apply compensation policies that it favors and to refuse to appoint arbitrators who do not follow these policies. There is no check on the ability of FMCS or the artibrators it appoints to ignore statutory, common law or constitutional limits on their own authority.[14]

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[14] *Amicus* PPG proffers the argument that the provision of FIFRA which permits judicial review in cases of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator" is sufficient to satisfy the requirement for Article III review. Essentially, PPG contends that such "other misconduct" includes errors of law by the arbitrators. (Brief for PPG Industries, Inc. as *Amicus Curiae*, at 23–24.) The authorities are clear, however, that review for misconduct under arbitration statutes is limited to an inquiry into whether the parties were given a full and fair opportunity to participate and present evidence, and does not allow consideration of the merits of the award. Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979); Local Union No. 251 v. Narragansett Improvement Co., 503 F.2d 309 (1st Cir. 1974). Even under arbitration statutes which expressly provide for judicial review, an error of law is not a basis for review of an arbitrator's decision. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436–37 (1953); In re I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974).

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Further, there is no compelling justification for Congress' decision in 1978 to remove compensation cases from Article III courts. Before 1978, compensation cases were decided by EPA, with a right of appeal to the federal district courts. *Monsanto*, 104 S. Ct. at 2868. Although it is understandable that Congress would wish to rid EPA of the chore of deciding compensation cases, there was no pressing need for withdrawing such matters from the cognizance of the Judiciary.[15] The nature of the issues in such cases—the valuation of the right to use an owner's trade secrets and proprietary data for competitive purposes—is one with which the courts are quite familiar. Certainly arbitrators chosen on an *ad hoc* basis are no better equipped to decide such issues than are federal district judges.

In short, the FIFRA arbitration scheme makes no provision even for the limited appellate review by Article III courts provided in the Bankruptcy Act that the dissenting justices found sufficient for Article III purposes in *Northern Pipeline*. It thus fails to meet any Member of the Court's construction of Article III's requirements.

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[15] At the time FIFRA was amended in 1978, *there was not a single compensation case* that had been tried administratively before EPA, nor obviously had any appeals been taken to the federal courts.

C. EPA Has Ignored The Article III Issue In This Case

EPA's sole contribution to resolving the Article III issue posed in this case is to argue that compensation under FIFRA is a federally-created right; that *Northern Pipeline* only pronounced Article III requirements for state-created rights; and that Congress' creation of mandatory data licensing and compensation procedures was within its general constitutional authority. (EPA Brief at 20–28.)

This vacuous argument does not advance the resolution of the issue that is before the Court: the extent to which Article III limits Congress' authority to create legislative courts to adjudicate federally-created rights, particularly where, as here, the adjudication also requires the valuation of trade secret property rights created under state law.

The implicit contention in EPA's argument is that when Congress creates a statutory right, it may deposit all judicial power to adjudicate that right wholly within legislative courts, to the exclusion of the Judiciary, as long as the subject matter generally is within Congress' constitutional powers. This proposition was rejected in *Northern Pipeline* and a long line of prior decisions of this Court as well.[16] No case has ever accepted the government's contention (indeed not a single precedent from this Court is offered in EPA's discussion), and with good reason. To hold that Congress may assign the entire adjudication of all federally-created rights to legislative courts of its own creation, completely bypassing the Judiciary, would

[16] *See* cases cited in *Northern Pipeline*, 458 U.S. at 73.

emasculate the separation of powers that Article III was designed to preserve.[17]

III. FIFRA's DELEGATION OF NON-REVIEWABLE LEGISLATIVE POWER TO ARBITRATORS VIOLATES ARTICLE I

Appellees are compelled to seek compensation in a system that is completely lawless. FIFRA establishes no standard for the arbitrator's determination of compensation. It delegates to the arbitrator unfettered discretion to prescribe his own standard and immunizes his decision from judicial control. This abdication of congressional responsibility is unsurpassed by any that has occurred in over fifty years, and violates constitutional limitations on the delegation of legislative authority.

Article I, Section 1, of the Constitution vests all legislative powers in Congress. Congress is not permitted to delegate that authority without defining standards to aid in the statute's implementation.

Since the Court's decisions in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), broad delega-

[17] EPA notes that the Court has rejected due process challenges to certain statutes requiring binding arbitration. (EPA Brief at 19.) That proposition is irrelevant to this case. This case involves private rights which require adjudication in an Article III court. *Northern Pipeline*, 458 U.S. at 80–81. FIFRA's arbitration scheme clearly violates Article III, whether or not it violates due process as well. The cases cited by EPA shed no additional light on the issues raised here. They concern state statutes not subject to Article III challenge, and challenges to the merits of consensual arbitrations under collective bargaining agreements. The case of Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943), cited by EPA, did not even involve a constitutional issue. *Id.* at 301.

tions of authority to administrative bodies with technical expertise have been sustained. Nevertheless, subsequent decisions illustrate that the non-delegation doctrine remains a valid principle of constitutional government.

Two conditions must be met in order for a delegation of legislative power to be sustained. First, a statute must delineate standards which the delegatee is to apply in the statute's implementation. *INS v. Chadha*, 103 S. Ct. 2764, 2785 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *United States v. Robel*, 389 U.S. 258, 274–75 (1967) (Brennan, J., concurring). *See also American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 544–45 (1981) (Rehnquist, J., dissenting); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, Douglas, and Stewart, JJ., dissenting). Second, the exercise of delegated authority must be subject to judicial review. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *United States v. Robel*, 389 U.S. at 277–81 (Brennan, J., concurring). *See also Arizona v. California*, 373 U.S. at 626 (Harlan, Douglas, and Stewart, JJ., dissenting).

These conditions ensure that "important choices of social policy" are made by Congress; guarantee an "intelligible principle" to guide the exercise of delegated legislative discretion; and provide that "courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

FIFRA says nothing more than that the me-too applicant must "compensate" the data submitter. § 3(c)(1)(D)(ii). Nothing further appears in FIFRA or its

legislative history to define this right or to establish a standard for its determination.

The district court below determined that this is a "standardless delegation of powers." (J.S. App. 19a.) Two other district courts, FMCS, and a former EPA Administrator all have reached the same conclusion. *Sathon, Inc. v. American Arbitration Association*, No. 84 C 6019, slip op. at 7 (N.D. Ill. Mar. 30, 1984), *appeal dismissed*, No. 84-1540 (7th Cir. July 3, 1984) ("there is nothing in the statute (or the regulations promulgated thereunder) relating to the standard to be applied in such proceedings"); *Monsanto Co. v. Acting Administrator, EPA*, 564 F. Supp. 552, 561, 567 (E.D. Mo. 1983), *vacated on other grounds, Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984) ("there are no discernible guidelines outlining the factors which constitute just compensation for use of [a submitter's] data").

FMCS, discussing the legislative history of the 1978 amendment of FIFRA, observed that neither the House nor the Senate "specified a formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55,394 (1980). In declining to impose a standard by regulation, FMCS stated: "The statutory scheme of FIFRA provides that the arbitrators will determine the standards on a case-by-case basis. . . ." 45 Fed. Reg. 28,107 (1980).

Former EPA Administrator Douglas M. Costle implored Congress to define a standard. He told the House Committee on Agriculture that pesticide producers "object to signing a 'blank check' for use of data—that an offer to pay reasonable compensation without knowing what that means in terms of dollars and cents is unpalatable from a business point of view." H.R. Rep. No. 663,

95th Cong., 1st Sess. 59 (1977). The Administrator asked Congress to establish a standard: "It would thus be helpful to applicants if the Congress would make more explicit what factors it feels are pertinent in determining reasonable compensation." *Id.*

As EPA points out, however (EPA Brief at 33 n.27), Congress totally abdicated its responsibility:

> The reasonableness of compensation is difficult to determine . . . . The Subcommittee agreed that the amount and terms of reasonable compensation would be determined by the parties involved . . . .
>
> The Subcommittee also adopted a provision for binding arbitration . . . if the parties fail to agree on compensation.

S. Rep. No. 334, 95th Cong., 1st Sess. 8 (1977). To exacerbate the matter, Congress deleted the adjective "reasonable," which it had used prior to the 1978 amendment of FIFRA to require payment of "reasonable compensation"; substituted a requirement that the applicant "compensate" the data submitter; and immunized the arbitrator's decision from substantive judicial review.

Congress has thus abdicated to an *ad hoc* group of arbitrators the choice of social policy in deciding on what basis compensation should be determined. It has failed to establish any "intelligible principle" to aid the arbitrator in that exercise,[18] and barred the courts from providing a

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[8] In its *amicus* brief, PPG claims that FIFRA establishes a "cost-sharing" standard for compensation. (Brief for PPG Industries, Inc. as *Amicus Curiae*, at 12, 17.) This is a self-serving effort to induce the Court to make a comment in its decision that would bolster PPG's pending district court challenge to the arbitration award arising from its use of Stauffer's data. *See* PPG Industries, Inc. v. Stauffer Chemical Co., No. 83-1941 (D.D.C. filed July 7, 1983). Quite tellingly,

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check against abuse of that undefined delegated authority. This affront to the Constitution's separation of powers cannot be sustained.

IV. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

A. The District Court Correctly Enjoined The Use Of Data Subject To The Invalid Arbitrator Compensation Scheme

Having found FIFRA's arbitrator compensation scheme unconstitutional, the district court enjoined EPA "from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)." (J.S. App. 25a–26a, ¶ 2.) The relief ordered by the district court was proper because FIFRA conditions the use of data upon payment of compensation.

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the arbitrators in that case discerned no such standard and declined to award compensation on the basis of the narrow cost-sharing theory proposed by PPG (or on the basis of the valuation principles proposed by Stauffer).

PPG's argument is, moreover, misleading. The legislative history which PPG cites relates, with one exception, to *pre*-1978 versions of FIFRA. And the exception, PPG's sole reference to the legislative history of the 1978 FIFRA, relates to a *draft* of the statute *which was never enacted*. S. Rep. No. 334, 95th Cong., 1st Sess. 4, 31 (1977). This draft was changed substantially in conference and thus does not illuminate the statute which was enacted.

A full exposition of the legislative history of the 1978 amendments shows that Congress was completely equivocal and expressly declined to establish a compensation standard. *See, e.g., id.* at 8, quoted *supra* at p. 30.

Section 3(c)(1)(D)(ii) authorizes EPA to rely upon an originator's data to grant a registration to a me-too applicant "*only if* the applicant has made an offer to compensate" (emphasis added). The statute provides a "right to compensation for the use of the data." *Id.* Thus, FIFRA establishes an inextricable link between the use of data and compensation.

Congress' purpose in requiring compensation was to prevent "just plain stealing" the use of data, *Federal Environmental Pesticide Control Act: Review of FEPCA Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 11 (1973) (statement of Rep. Poage, Chairman, House Committee on Agriculture), and to ensure that me-too applicants would not receive a "free ride." *See* S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4091–92. Congress would not have permitted the use of data in the absence of a procedure for obtaining compensation. This was confirmed by Senator Patrick Leahy, a principal sponsor of the arbitration provision:

> [W]e are not allowing free use of . . . data by competitors. If a registrant wishes to use the data generated by another company to support their registration then he must pay compensation for the data . . . .

123 Cong. Rec. 25,706 (1977).

Congress thus viewed compensation as the *quid pro quo* for the use of the submitter's data. The use-compensation system was enacted as "a single statutory grant of jurisdiction," *Northern Pipeline*, 458 U.S. at 87 n.40, and cannot be severed as EPA suggests (EPA Brief at 33 n.28). Enjoining the use of data was the only proper relief

the district court could have granted to effectuate the congressional purpose.[19]

B. The Unconstitutional Arbitration Scheme Must Be Restructured By Congress, Not The Court

Because the arbitration scheme is unconstitutional, it is up to Congress to restructure it in a manner that will comply with Article I and Article III. To satisfy Article I, Congress must establish an intelligible principle for awarding compensation. To comply with Article III, Congress must provide for the exercise of judicial power by Article III courts "at all stages of adjudication, and not only on appeal." *Northern Pipeline*, 458 U.S. at 86 n.39.

Although Congress' attempt to establish an arbitration scheme with no set standard, insulated from the authority of the Judiciary, is unconstitutional, these features of the scheme are a fundamental part of Congress' plan for resolving compensation disputes through arbitration "within the private sector" in a manner that does "not require

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[19] Contrary to EPA's assertion, the district court did not enjoin EPA from implementing "the entire data licensing system." (EPA Brief at 29.) The district court's order restrained only those uses of data for which compensation must be sought in an unconstitutional arbitration. (J.S. App. 25a–26a.) Many data are not subject to the compensation scheme at all, and may be used without any offer to pay compensation (e.g., data in the public literature, data submitted prior to 1970, or data which are more than 15 years old). Furthermore, EPA will remain able to register new pesticides; applicants for registration may submit their own test data to support their applications, and may rely on previously submitted data if the submitters have given permission. Ruckelshaus v. Monsanto Co., 104 S. Ct. 3, 4 (Blackmun, Circuit Justice, 1983). EPA adopted interim procedures to permit registration in this manner. *Id.*

active governmental involvement." 123 Cong. Rec. 25,710 (1977) (statement of Sen. Leahy).

Congress made its intent quite plain. It provided for arbitration that is "binding." It stated that "the findings and determination of the arbitrator shall be final and conclusive," and it declared that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." § 3(c)(1)(D)(ii). It declined EPA's specific request to define how compensation should be determined, and instead lodged that authority with *ad hoc* arbitrators to be decided on a case-by-case basis. (*See supra* p. 29.) Thus Congress' restructuring of the compensation system in 1978, from an administrative system with full judicial review, to an arbitration scheme with no review, obviously was a deliberate plan to effectuate the congressional purpose of establishing a non-governmental dispute resolution mechanism.

Moreover, the preclusion of substantive judicial review is the hallmark of the arbitration process:

> If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.

Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1855). *See also* 5 Am. Jur. 2d *Arbitration and Award* § 140 (1962); M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION*, 254–56 (1968); 6 C.J.S. *Arbitration* § 70 (1975).

Under these circumstances, it cannot be said that if Congress had been aware that the arbitration system's lack of standards and judicial review rendered it unconstitutional, it would have chosen a hybrid form of reviewable arbitration as the vehicle for deciding compensation

disputes. The type of judicial involvement required by Article III is generally avoided in arbitration, and would defeat Congress' purpose of resolving compensation disputes in the private sector without governmental involvement.

EPA suggests that FIFRA's constitutional defects could be cured if the Court were to strike all of the language in the statute which indicates that the arbitrator's decision is to be binding, final, conclusive and non-reviewable, and were to read a right of judicial review into the statute (and, presumably, were to supply standards to guide the arbitrator and to test his decision in court review). (EPA Brief at 30.)

Whether a court can sever and restructure a statute is a question of legislative intent. *INS. v. Chadha*, 103 S. Ct. at 2774–75. The presence of a severability clause "may sometimes aid in determining that intent. But it is an aid merely; it is not an inexorable command." *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1929) (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924)). The court may not sever selected portions of a statute if there is a "clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." 278 U.S. at 242.

Here, Congress' intent to keep compensation disputes out of the courts and within the private sector is quite clear. To shift the adjudicatory functions from the arbitrators to the courts under these circumstances would fundamentally alter the design of the arbitration scheme and thwart Congress' purpose.[20]

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[20] Had Congress envisioned the constitutional infirmities in the arbitration system it created in 1978, it may very well have adopted

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Similarly, it is fallacious for EPA to suggest that severance of the portions of FIFRA that bar judicial review somehow would affirmatively create a right to judicial review. (EPA Brief at 31.) Whether a right of review will be inferred is purely a question of congressional intent. *Block v. Community Nutrition Institute*, 104 S. Ct. 2450, 2456 (1984); *Southern Ry. Co. v. Seaboard Allied Milling Co.*, 442 U.S. 444, 454–63 (1979). Here, Congress made it manifestly clear that it wanted to preclude substantive judicial review. Striking Congress' words from the statute cannot alter its plain intent that the courts are not to review arbitration decisions.[21]

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an entirely different scheme altogether. Indeed, in 1982 the House of Representatives, joined by the Senate Committee on Agriculture, Nutrition and Forestry, approved substitute legislation that would have abandoned the arbitration system and replaced it with different forms of research incentives and protections for proprietary trade secret information. *See* S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982).

[21] Furthermore, the Court has rejected the contention that EPA makes here that a right to substantive judicial review arises out of 28 U.S.C. § 1331. Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301–06 (1943). The case cited by EPA, International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963), merely recognizes jurisdiction under § 1331 to *enforce* an award of an airline board of adjustment, not to obtain substantive judicial review of an award.

The contention of *amici* Griffin and Drexel that FIFRA § 16(c) creates a private cause of action, which would encompass judicial review of arbitrators' decisions (Brief of Griffin Corporation and Drexel Chemical Company as *Amicus Curiae*, at 16), has been rejected by every court in which it has been raised, and the government has consistently maintained that no such right of action exists. *See, e.g.*, In re Agent Orange Product Liability Litigation, 635 F.2d 987, 991 n.9 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); Fiedler v. Clark, 714 F.2d 77, 79–80 (9th Cir. 1983).

The courts "cannot rewrite a statute and give it an effect altogether different from . . . the measure . . . as a whole." *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330, 362 (1935). "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). A statute which expressly prohibits judicial review may not be rewritten by the courts in order to cure a constitutional defect. *Swain v. Pressley*, 430 U.S. 372, 376–78 (1977).

The Court thus should leave it to Congress to reformulate a constitutional method for adjudicating compensation disputes. As the Court similarly concluded in *Northern Pipeline*, "it is for Congress to determine the proper manner of restructuring the [statute] to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose." *Northern Pipeline*, 458 U.S. at 88 n.40.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

KENNETH W. WEINSTEIN
(Counsel of Record)
LAWRENCE S. EBNER
STANLEY W. LANDFAIR
ALISON L. DOYLE
McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Appellees

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No. 84-497

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS, CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Appellees offer no persuasive answer to our submission that this case is not justiciable. In *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 31 (emphasis added), where the identical attack was made on the statutory scheme, the Court held that "[o]nly after EPA has considered data submitted by Monsanto in evaluating another application *and an arbitrator has made an award* will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." No appellee other than Stauffer has cleared the initial hurdle of presenting a ripe claim. They argue instead that registrations have been granted to other companies based on data previously submitted by appellees, but there is no allegation that any of the appellees (other than Stauffer) has been a party to an arbitration on the compensation due, if any, for these occurrences. *Monsanto* therefore precludes consideration of these appellees' claims.

Stauffer, of course, did receive an arbitration award, but nothing in *Monsanto* suggests that this fact is not only a necessary but also a sufficient precondition to adjudicating constitutional attacks on the arbitration scheme. On the contrary, as this Court has often held, Article III requires a plaintiff to establish an injury in fact *and* to request relief that will redress that injury. See, *e.g., Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 13; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Our opening brief (14-18) showed that Stauffer has not satisfied this requirement for the simple reason that it has not requested any relief from the terms of the arbitration award. Appellees have presented no response to this argument.[1] Instead, appellees appear to rely on their claim that the prospective relief they request will relieve them of the " 'clear threat' " of future arbitration (Br. 13). This "threat," however, was not sufficient to make Monsanto's claim ripe, and the claim is

[1]Contrary to appellees' contention (Br. 16), EPA did not concede the correctness of the district court's finding that Stauffer was "aggrieved" by the alleged difference between the amount it sought and the amount awarded by the arbitrators. These findings of fact and conclusions of law were entered by the court on appellees' post-judgment motion under Rules 52(b) and 59(e), Fed. R. Civ. P., to alter or amend the judgment. The government opposed the entry of such findings and conclusions as inappropriate; alternatively, on the premise such action was warranted, the government objected to several conclusions of law as inconsistent with the previously entered judgment. While the government did state that it agreed "that no genuine issue as to any material facts exist in this action and *accordingly* does not contest any of plaintiffs' proposed findings of fact," the government expressly stated that "defendants in no way waive their right to challenge all conclusions of law as well as certain factual findings on their appeal of the judgment of the Court." Memorandum of Law in Opposition to Plaintiffs' Motion to Amend Judgment 2, 3 & nn.*,** (emphasis added).

no more ripe here.[2] So long as no appellee claims that it has engaged in an arbitration that failed to "vindicate its statutory right to obtain compensation" (*Monsanto*, slip op. 31), its legal claim is no more justiciable than that rejected as premature in *Monsanto*.

2. Appellees err in suggesting (Br. 19, 22) that arbitrators will be adjudicating state law trade secret rights. Appellees' claim is that the test data may contain valuable trade secret techniques protected by state law. But, FIFRA's compensation scheme is not for disclosure of data; it arises instead from EPA's consideration of the data in approving a subsequent application for a pesticide registration. The subsequent applicant normally does not see the data but merely cites data referred to in a catalog compiled and published by EPA.[3] Furthermore, if the subsequent applicant is a multinational firm, that company is prohibited by the statute from obtaining the data. 7 U.S.C. 136h(g). Thus, the right that is adjudicated in the arbitration is the federal right to compensation under the federal statute (see *Monsanto*, slip op. 31), not any right to trade secret protection provided by state law.

3. Appellees also argue (Br. 27-31) that their claim of improper delegation of legislative authority, which was not adjudicated below, would support the judgment. The gist of

[2]Nor does the fact that Stauffer went through one arbitration increase the likelihood that that event will occur again. As the Court noted in *Monsanto*, slip op. 31, first EPA would have to consider Stauffer's data in considering another application, and then the parties might still be able to reach an agreement on the amount of compensation, thus avoiding the need for arbitration. Consequently, even with respect to Stauffer, the "threat" of future arbitration is not sufficiently immediate to confer standing. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-107 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974).

[3]Conversely, a member of the public that obtains disclosure of data pursuant to FIFRA (see *Monsanto*, slip op. 7-8) does not thereby incur any compensation obligation under the statute.

appellees' assertion is that Congress failed to provide standards for measuring the compensation due under the statute. This contention has no merit. The compensation provision was inserted in the statute in 1972, and provided for the right to "reasonable compensation for producing the test data to be relied upon." Pub. L. No. 92-516, § 3(c)(1)(D), 86 Stat. 980. The stated purpose was to spread the costs of data development (S. Rep. 92-838, 92d Cong., 2d Sess. Pt. II, at 69, 72-73 (1972)).[4] The intended measure of compensation was plainly the equitable division of those costs. In 1978, Congress substantially altered the procedural aspects of the arbitration and compensation scheme, assigning the determination of the amount of compensation to the parties and the arbitrators rather than to EPA. It is clear from the legislative history, however, that no change was intended in the expected measure of compensation. See S. Rep. 95-334, 95th Cong., 1st Sess. 7-8, 31 (1977) (compensation is for "the costs of developing data necessary for government approval"); 123 Cong. Rec. 25706 (1977) (emphasis added) (the scheme "protects the data developer's right *to recover his data generation costs*") (remarks of Sen. Leahy).

For these reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1985

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[4]This purpose did not change when Congress amended Section 3(c)(1)(D) in 1975 to cut off compensation rights for data submitted prior to January 1, 1970. See S. Rep. 94-452, 94th Cong., 1st Sess. 10 (1975).